No. 91-7849-CFX
Status: GRANTED

Title: Stephen Buckley, Petitioner
v.
Michael Fitzsimmons, et al.

Docketed:
April 1, 1992

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Stainthorp,John L.

Counsel for respondent: Sotos,James G.

Entry	Date	Note	Proceedings and Orders
1	Apr 1 1992	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	May 7 1992		DISTRIBUTED. May 22, 1992
4	May 20 1992	P	Response requested -- JPS. (Due June 22, 1992)
5	Jun 22 1992		Brief of respondent Michael Fitzsimmons, et al. in opposition filed.
6	Jul 2 1992		REDISTRIBUTED. September 28, 1992
8	Oct 5 1992		Petition GRANTED. limited to Questions 1 and 2 presented by the petition.
			**********
9	Nov 2 1992		Record filed.
		*	Original proceedings United States District Court for the Northern District of Illinois.
10	Nov 12 1992		Joint appendix filed.
11	Nov 19 1992		Brief of petitioner Stephen Buckley filed.
17	Dec 4 1992	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Dec 16 1992		Brief amicus curiae of Appellate Comm. of California District Attorneys Association filed.
16	Dec 23 1992		Brief of respondents Michael Fitzsimmons, et al. filed.
14	Dec 28 1992		SET FOR ARGUMENT MONDAY, FEBRUARY 22,1993.(2nd CASE).
15	Dec 28 1992		Brief amicus curiae of United States filed.
18	Jan 7 1993		CIRCULATED.
19	Jan 11 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Jan 27 1993	X	Reply brief of petitioner filed.
21	Feb 16 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
22	Feb 22 1993		ARGUED.

EDITOR'S NOTE

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

91-7849

No. _____

ORIGINAL

STEPHEN BUCKLEY

Plaintiff-Petitioner,

vs.

MICHAEL FITZSIMMONS, THOMAS KNIGHT, PATRICK KING
JAMES RYAN, ROBERT KILANDER, EDWARD GERMAN
ROBERT OLSEN AND THE ESTATE OF LOUIS ROBBINS

Defendant-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of and participation in a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?

2) Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability because some of the injury occurred during the later criminal proceedings?

3) Whether experts who conspire with prosecutors to manufacture false evidence which inculpates the plaintiff, and who write out of court reports and render out of court opinions in furtherance of this conspiracy, are entitled to absolute immunity as witnesses because the most inculpatory of those reports and opinions are later presented in testimony to a grand jury and at a criminal trial?[1]

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[1]Rule 21(b) - The parties to the proceeding before the United States Court of Appeals for the Seventh Circuit were the County of DuPage, Richard Doria, J. Michael Fitzsimmons, James Ryan, Robert Kilander, Thomas Knight, Patrick King, Edward German, Robert Olsen and the Estate of Louise Robbins.

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STATEMENTS UNDER RULE 21

Rule 21(d) - The decisions of the Court of Appeals are reported at 919 F.2d 1230 (7th Cir. 1990) and 952 F.2d 965 (7th Cir. 1991), and are attached hereto as Appendices A and B. The prior decision of this Court is reported at ___ U.S. ___, 112 S.Ct. 40 (1991) and is attached as Appendix C. The decision of the District Court is unreported and is attached as Appendix D.

Rule 21(e) - Jurisdiction of this Court is invoked pursuant to this Court's power to review a final decision of a United States Court of Appeals.

(i) The decisions of the Court of Appeals were dated December 5, 1990, and January 2, 1991, while this Court's decision was dated October 7, 1991.

(ii) No Petition for Rehearing was filed with regard to the first decision; however, since the panel concluded that their decision was in conflict with two decisions of the Eleventh Circuit on the issue of out of court prosecutorial statements, the panel circulated their opinion to all the active judges on the Seventh Circuit. Two judges voted to rehear the case en banc, while two others recused themselves. As to the second decision, Petitioner attempted to file a petition for rehearing with suggestion for rehearing en banc, nine days late, instanter, after a request for a ten day enlargement of the time in which to file was denied. Leave to file late was likewise denied on January 27, 1992.

(iv) Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1254

Rule 21(f) - 42 U.S.C. Section 1983 (1981):

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

No. _____

STEPHEN BUCKLEY,

Plaintiff-Petitioner,

vs.

MICHAEL FITZSIMMONS, THOMAS KNIGHT, PATRICK KING
JAMES RYAN, ROBERT KILANDER, EDWARD GERMAN
ROBERT OLSEN AND THE ESTATE OF LOUIS ROBBINS

Defendant-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Statement of the Case

This is a civil rights action for damages brought pursuant to 42 U.S.C. 1983 and state law by Plaintiff-Petitioner Stephen Buckley. In his complaint, Buckley alleged a conspiracy between the elected Sheriff of DuPage County, several deputy sheriffs, two successive elected State's Attorneys, several assistant states attorneys, and several forensic "experts" to wrongfully arrest, imprison and prosecute him for a crime the conspirators knew he did not commit, and to engage in a media campaign designed to destroy the plaintiff's right to fair hearings and trial(s) before an unbiased judge and jury, to publicly defame him, and to cover up

their own wrongdoing. (78, 80, 81)[2] The conspiracy was perpetrated in order to draw public attention away from the conspirators' failure to solve a highly publicized and highly charged case and as part of a political campaign by Respondent State's Attorney Michael Fitzsimmons to keep his job in the face of a vigorous effort, ultimately successful, to oust him. (78) As a result of this conspiracy, Petitioner was wrongfully arrested and imprisoned for three years before all charges against him were dropped. Petitioner also alleged several Monell policy and practice claims against the Sheriff, the States Attorney and DuPage County.

On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, DuPage County, Illinois, sexually molested, and murdered; her body was not discovered for several days. (19) The abduction, search and discovery of her body engendered extensive publicity, and the brutality of the crime aroused intense emotions among the populace of DuPage County. (21) The publicity and emotions were subsequently fostered and inflamed by public statements made or prompted by some of the Respondents. (54).

The investigation into the crime was jointly undertaken by the DuPage County Sheriff, Richard Doria, the DuPage County Sheriff's office (including various defendants who are not parties to this petition), and members of the DuPage County State's Attorney's

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[2]All references in this Statement of the Case are to paragraphs of the Petitioner's Amended Complaint. [Appendix E]

office, including the elected State's Attorney of DuPage County, Respondent Fitzsimmons, and Respondent Assistant State's Attorneys Thomas Knight and Patrick King. (20, 25, 28, 30, 32)

The brutality of the crime and the wide publicity it received created great public pressure on the defendants to find someone to charge. (21) In the absence of credible evidence as to who actually committed the crime, they seized upon the mention of Petitioner's name by an obviously mentally disturbed and totally incredible person, Alex Hernandez, and proceeded to work together over the next several months to direct their investigation toward fabricating a case against the Petitioner, Hernandez, and another person, Rolando Cruz. (22, 35, 42, 43)

As part of this joint Sheriff-State's Attorney investigation, deputy sheriff's detectives went to Petitioner's house and interrogated him. During the questioning Petitioner voluntarily gave the deputy sheriffs a pair of his boots so that they could determine whether these boots had made a bootprint found on the Nicarico's door. (23) The boots were submitted to the sergeant in charge of the identification section of the DuPage County Crime Laboratory, John Gorayczyk, who determined that the boots did not match the print, a determination that was confirmed with the head of the crime laboratory and was communicated to, among others, Sheriff Doria, State's Attorney Fitzsimmons, and his assistants, Knight and King. (24, 25) The Sheriff immediately confiscated the boots from Gorayczyk before he could complete his tests and report (26), and sent the boots to Respondent Edward German of the

Illinois Department of Law Enforcement Crime Lab in an attempt to get a statement from him that the boot and print did match. (26, 27) Initially German wrote in his notes that the boot "could have at best" made the print on the door and that "another shoe could very well have made the print." By the time he wrote his official report he had omitted the qualifiers and stated that the boot "could have" made the print. (27) In fact, the evidence demonstrated that Petitioner's boot did not make the print on the Nicarico door. (53)

German's false conclusions were not sufficient for the conspirators, who sought to generate further false evidence against Petitioner from Respondent Olsen of the Kansas Bureau of Identification, and Respondent Louise Robbins. (28) Olsen, who reviewed German's notes and reports but not the boot itself, initially concluded that the boot and print had "similar class characteristics" but that "the paucity of sufficient similar individual characteristics precluded a positive identification." (29) Subsequently he agreed to change his conclusions so as to falsely implicate the Petitioner. (53) Louise Robbins, an anthropologist whose theories and reputation were well known to be discredited, then agreed to give the investigators, including Knight and German, the "positive identification" they had been searching for, even though the boot and print did not in fact match at all. (31, 53)

At the same time as the Sheriff and State's Attorney investigators were manufacturing the boot print evidence, they were

also repeatedly interrogating both the Petitioner, using intimidation and intense pressure, and Hernandez, whose mental instability was obvious. (32) Nevertheless, even these heavy handed tactics failed to create any credible evidence against Petitioner, and an experienced detective working on the case told Doria, Knight, King and other defendants that Petitioner was not involved in the crime. (33, 34) Nevertheless Fitzsimmons, Knight, King and Doria convened a special investigative grand jury solely for the purpose of investigating the Nicarico case. (32, 35)

The conspirators, including Knight, King, Fitzsimmons and Doria, continued their efforts to create false evidence against the Petitioner by calling him before the grand jury and intimidating him during his interrogation. (36) They also misrepresented the bootprint evidence to the grand jury, and introduced much incredible, irrelevant, false, and contradictory hearsay and double hearsay evidence in order to prejudice the Petitioner before the jury. (38) In addition, the investigators, including Knight, King, and Doria gave money to Hernandez and Cruz in an attempt to obtain false evidence against the Petitioner. (39, 40)

Despite this abuse of the grand jury, Respondent Fitzsimmons publicly admitted on January 27, 1984, that he had insufficient evidence to indict or prosecute. (41) Then, on March 9, 1984, only a few days before the hotly contested primary election for State's Attorney, Fitzsimmons, Knight, King and Doria obtained grand jury indictments against Petitioner, Hernandez and Cruz despite the fact that no new evidence of significance had been presented since

Respondent Fitzsimmons' admission of January 27th (42). All three were unable to make their $3,000,000 bond and were arrested and imprisoned at the direction of defendants Knight and Doria. (42, 46) These indictments were obtained in order to enhance Fitzsimmons' position in the election. (46)

In order to reap political benefits from this high profile case, Fitzsimmons himself appeared at a press conference that same day. (44) Knowing that his statements would further prejudice the Petitioner in his defense of the case, and aware of the pre-existing public emotion and prejudice against anyone connected with the crime, he nonetheless referred to prior criminal conduct alleged against the Petitioner by claiming he was part of a burglary ring, asserted that the Petitioner was guilty of the Nicarico murder, misrepresented evidence, including the bootprint evidence, and released mug shots of the Petitioner to the media. (44, 78)

Even after the indictment, the conspirators continued to attempt to create false evidence. (46, 47) Investigators, including Respondents Knight and King, attempted to obtain false admissions and false testimony from Petitioner, Hernandez and Cruz by threatening the death penalty if they did not cooperate (46); persons within the Sheriff's department who objected to the "railroad" were given unfavorable assignments and forced to resign (49); evidence favorable to the Petitioner was suppressed by the investigators, including Knight, King and Doria (50); and investigators including Respondent Knight and Doria continued to

work with Respondents German, Olsen and Robbins to "shape" their evidence so as to falsely implicate the Petitioner. (53)

In November, 1984 Respondent Ryan replaced Fitzsimmons as State's Attorney. He appointed Respondent Knight as the Special State's Attorney for the Nicarico prosecution, and approved and authorized the continued imprisonment and prosecution of the Petitioner and his co-indictees. (52) In January 1985 the case came to trial in an atmosphere poisoned by prejudice against the Petitioner, caused in part by public statements made, or prompted, by the Respondents, including Fitzsimmons. (54) At trial, Respondents Olsen and German presented false opinions designed to secure the Petitioner's conviction. (55) False statements, bought with money, from Petitioner's co-defendants were also presented at the joint trial of the three defendants. (56) Despite this concerted effort by the Respondents to falsely convict him through prejudice and false evidence, the jury was hung as to Petitioner and a mistrial was declared.

Notwithstanding their failure to obtain a conviction, the Respondents continued their efforts to falsely imprison and accuse the Petitioner. (58) As part of this effort, Knight publicly announced that Petitioner would be retried, while Fitzsimmons, who was no longer the State's Attorney but who remained a central figure in the conspiracy to wrongfully imprison the Petitioner, made public statements to the media in which he again falsely claimed that Petitioner was guilty of raping and killing Jeanine Nicarico. (58, 59) In addition, the State's Attorneys, including

Knight, continued to fan the flames of prejudice by encouraging and prompting the Nicarico family and friends to make inflammatory statements that the Petitioner was guilty of the crime. (59)

Petitioner remained imprisoned pending the proposed re-trial, still held on the $3,000,000 bond, which was set so high because of the emotions and prejudice engendered by the public statements of the State's Attorney conspirators. (58, 45, 46) During this period the various defendants, including Respondent-prosecutors Knight, Kilander and Ryan, and Sheriff Doria were informed that another man, Brian Dugan, had admitted that he alone raped and murdered Jeanine Nicarico. (60-62) Despite this admission, which was corroborated both by Dugan's recitation of details that would be known only to the murderer and by his successfully passing a polygraph test, the defendants, including Respondents Ryan, Knight, and Kilander continued their conspiracy to wrongfully imprison Petitioner, and Knight made false and misleading statements to the media attempting to discredit Dugan's confession, in order to maintain and increase public prejudice against the Petitioner, and to thereby justify his continued imprisonment. (62, 64, 65)

The conspiracy to wrongfully imprison continued with the State's Attorneys' opposition to the Petitioner's attempt to lower his bond, even in the face of a report from an FBI expert demonstrating that Petitioner's boot did not make the footprint on the door. (66) Aware that the manufactured case against the Petitioner was crumbling, and that Petitioner would have to be released unless more evidence was fabricated, Respondent Kilander

interrogated a prisoner for the purpose of investigating an alleged inculpatory statement made by the Petitioner. (67) Kilander subsequently claimed he had obtained such a statement, but this claim was a fabrication by Kilander. (68) Nevertheless this purported statement caused the further postponement of Petitioner's retrial and thus his continued imprisonment. (68) Petitioner remained imprisoned until March, 1987 when the defendants, including Respondents Ryan, Knight, Kilander and King, used Respondent "expert" Louise Robbins' death as a pretext to dismiss the charges against him, while refusing to publicly acknowledge that Petitioner was innocent of the Nicarico murder, and that they had arrested and imprisoned the wrong man. (72)

The District Court dismissed all claims against the prosecutors and forensic experts, except for the claim against Fitzsimmons for his public statements at the pretrial press conference, on the basis of absolute prosecutorial and witness immunity. It upheld the Monell claims as to the Sheriff but not as to the State's Attorney, holding that the Sheriff was a county official, while the State's Attorney was a state official. Fitzsimmons appealed, as of right, the portion of the decision which denied him absolute immunity, and the Court entered a Rule 54(b) judgment as to the remainder of its order.

The Court of Appeals, in an opinion authored by Judge Easterbrook, refused to review significant portions of the District Court's decision under Rule 54(b). Specifically, it refused to review the Monell issues, and the Petitioner's appeal concerning

Respondent Fitzsimmons because a "factually related" claim against Fitzsimmons and the County remained undismissed at the time of the appeal. Additionally, the Court rejected as tardy the District Court's later certification of these issues under 28 U.S.C. 1292(b). Buckley v. Fitzsimmons, 919 F.2d 1230, 1239 (7th Cir. 1990)

On the merits, the Court declined to wait for this Court's then imminent decision in Burns v. Reed, 500 U.S. ___, 111 S.Ct. 1934 (1991), but instead forged ahead to further expand prosecutorial and witness immunity. After acknowledging that immunity "applies to the act, not the actor," the Court announced the principle that the determinative factor was not the nature of the act, standing alone, but rather the circumstances and locus of the injury occasioned by the act. Purportedly applying this principle it then extended immunity to Buckley's prosecutors for each and every act, save one, which they were alleged to have committed. 919 F.2d 1241-42. Its only exception was on the narrow issue of the prosecutor's involvement in the interrogation of the Petitioner which the Court remanded to determine whether the injury arose when the fruits of the interrogation were used in the criminal process (i.e. a statement was presented to the grand jury or at trial) or whether the injury was complete at the time of the interrogation itself, or was otherwise unrelated to the criminal proceedings (i.e. the victim was beaten or tortured while interrogated). 919 F.2d 1241-42.

As to the issue of State's Attorney Fitzsimmons' pretrial

press conference, the Court of Appeals, acknowledging that it was holding contrary to the Eleventh Circuit in Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983), and Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988), and in direct conflict with its prior decision in Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979),[3] held that since Fitzsimmons' public statement was alleged to have caused injury which was suffered during the criminal process -- it prejudiced the jury so that an acquittal was not obtained and the Judge so that he would not reduce Petitioner's bond from $3 million even after the jury hung and Dugan confessed -- it could be sufficiently redressed during that same criminal process. 919 F.2d 1242. Using the same rationale as it applied to the prosecutorial interrogations, the Court reversed the District Court and afforded Fitzsimmons prosecutorial immunity for his pretrial press conference.

As to the "experts", it found that their alleged participation with the prosecutors and sheriffs in manufacturing bootprint evidence was covered by absolute immunity, despite the fact that many of the alleged acts -- such as writing and altering reports, and modifying, falsifying and communicating opinions -- were outside the judicial proceedings themselves, on the theory that the injury from these acts occurred after these reports and opinions were placed into the judicial process.

Senior Judge Fairchild, who was in the majority in Hampton v. Hanrahan, dissented on the issue of Fitzsimmons' public statements,

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[3]The Court therefore circulated its opinion to the entire Court, and two judges voted to rehear the issue en banc, while two other recused themselves.

stating:

> It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.
>
> Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply.

919 F.2d 1246

In March of 1991, Petitioner filed his first Petition for Certiorari, raising the following questions for review:

> 1. Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability?
>
> 2. Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of and participation in a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?
>
> 3. Whether experts who conspire with prosecutors to manufacture false evidence which inculpates the plaintiff, and who write out of court reports and render out of court opinions in furtherance of this conspiracy, are entitled to absolute immunity as witnesses because the most inculpatory of those reports and opinions are later presented in testimony to a grand jury and at a criminal trial?

Buckley v. Fitzsimmons, 90-7574, Petition at p. i.

On May 30, 1991, the United States Supreme Court affirmed in

part and reversed in part the Seventh Circuit's decision in Burns v. Reed,[4] holding that prosecutorial advice given to police officers in pursuit of their investigation was not covered by absolute prosecutorial immunity while the prosecutor's conduct before a judicial probable cause hearing to obtain a search warrant was so immunized. This Court further left open the question as to whether the prosecutor's decision to convene such a probable cause hearing was subject to prosecutorial immunity. In its opinion, this Court cited the Buckley opinion on the narrow question, not raised by Petitioner Buckley in his petition for certiorari, of a prosecutor's conduct in front of the grand jury. Burns v. Reed, 111 S. Ct. at 1941 n.6, citing Buckley at 1243.

Subsequent to this Court's decision in Burns, the Defendants-Respondents here filed their Brief in Opposition to Buckley's Petition for Certiorari. In their summary of argument they focused on the main issue of contention with regard to the panel's decision, stating their position that:

> Though separated into three sections -- two dealing with prosecutorial immunity and one with witness immunity -- the Respondents' brief in opposition to Petitioner's petition for certiorari is premised upon a single overriding theme. Specifically, the Seventh Circuit's focus on the nature of Petitioner's claim and the source of his injury in resolving the immunity issues is entirely consistent with, and indeed mandated by, this Honorable Court's decisions on immunity, and is further compatible with the decisions of the other Circuit Courts of Appeal as well.

Br. in Opp. pp. 4-5

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[4]894 F.2d 949 (7th Cir. 1990) aff'd in part and rev'd in part at 500 U.S. ___, 111 S. Ct. 1934 (1991).

The Respondents repeatedly relied upon this Court's decision in Burns in arguing this position, asserting that Burns "fully supports the Seventh Circuit's approach [of focusing on the source of injury] in the instant lawsuit" [Br. in Opp. p. 10] and that "in determining not to await this Court's decision in Burns, Judge Easterbrook specifically noted the distinction between the out of Court injuries in Burns and the in Court injuries suffered by Buckley." Br. in Opp. at 11.

This Court thought differently, however, and on October 7, 1991 entered the following order in this case:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Burns v. Reed, 500 U.S. _____ (1991)

112 S. Ct. 40 (1991) [Appendix C]

Pursuant to the Supreme Court's vacate and remand order, the parties filed statements of position pursuant to Circuit Rule 54.[5]

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[5]Plaintiff filed the following summary of position:

> It is plaintiff's position that the Supreme Court's decision in Burns v. Reed, when read together with the history of this case, and the Supreme Court's subsequent order herein, mandates that the District Court's grant of absolute prosecutorial immunity for the investigative conduct of the defendants be reversed, that the District Court's denial of prosecutorial immunity for the defendants' administrative acts be affirmed, and that the District Court's grant of absolute witness immunity for out of court acts likewise be reversed. It is plaintiff's further position that this Court reconsider its denial of the District Court's 28 U.S.C. 1292(b) certification and decide the Monell questions briefed and argued before it, since the stated reason for denial -- its lateness -- is no longer operative, and all parties and the District Court agree that judicial economy

On January 2, 1992 a majority of the same panel reentered its original judgment, except for a direction to the District Court to "examine whether the persons who arrested the plaintiff lacked probable cause." Buckley v. Fitzsimmons, 952 F.2d 965, 968-9 (7th Cir. 1992) In so doing the majority concluded that Buckley "is not directly governed by Burns," reiterated Judge Easterbrook's pre-remand conclusion in Millsbaugh v. County Department of Public Welfare, 934 F.2d 1172, 1175 (7th Cir. 1991) that "Burns reinforces Buckley's approach," and expressly reaffirmed its original rationale and opinion. Additionally the Court declined to consider Petitioner's Paul v. Davis[4] argument on the prosecutorial publicity question, because the Petitioner purportedly did not preserve it on his original certiorari petition.

ARGUMENT

By deciding Burns v. Reed, and by vacating the lower Court's decision in light of Burns, this Court has recognized the importance of further defining the scope of absolute prosecutorial immunity, particularly in the area of investigative prosecutorial acts, in light of the added protections afforded government officials by Harlow v. Fitzgerald, 457 U.S. 800 (1982) and its progeny. The importance of those issues is underscored by the fact that they arise here in a socially and politically significant case

require its pretrial resolution. Finally, it is plaintiff's further position that this case be reargued. [Plaintiff's Statement of Position, pp. 4-5]

[4]424 U.S. 693 (1976)

of high public interest, a case which implicates serious questions concerning grossly improper conduct by the highest ranking prosecutorial officials of DuPage County, and the wrongful imprisonment of an innocent man for over three years.[7]

Here, the Court below took it upon itself to further extend its own decision in Reed, even while this Court was reviewing that very decision. Then, after this Court decided Burns, granted certiorari in Buckley, vacated the panel's original opinion, and directed it to reevaluate it in light of Burns, the majority of the panel chose to continue to follow the logic of its first opinion while reinstating it.

Specifically, the majority's decision in Buckley refuses to follow Burns, relies heavily on its expansive view of Imbler v. Pachtman, 424 U.S. 409 (1975), and expands the scope of absolute prosecutorial immunity in a fundamental way which is almost entirely unsupported by precedent - it changes the focus from the acts and conduct of prosecutors and witnesses to instead concentrate on where and when the injury to the plaintiff took place, thereby cloaking with absolute immunity acts by said officials which would otherwise clearly be considered non-immunized investigative and administrative conduct. In stark contrast, all nine Justices in Burns took just the opposite approach, holding

[7]The list of public officials who have declared Respondent and his co-defendants to be innocent now include one of the main investigators on the case, the former head of the Illinois State Police which later investigated the case, the police chief of the town in which the killing took place, and the Assistant Attorney General who was assigned to write the Appellate Briefs for the prosecution in the appeals of Respondents' co-defendants.

that the expanded scope of qualified immunity, as first established in the post-Imbler decision of Harlow v. Fitzgerald, requires a narrowing of these absolute immunities, as well as the scope of Imbler itself:

> The qualified immunity standard is today more protective of officials than it was at the time that Imbler was decided. 'As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law.' Malley, 475 U.S., at 341; see also Mitchell, 472 U.S., at 524.
>
> In Harlow v. Fitzgerald, we 'completely reformulated qualified immunity,' Anderson, 483 U.S., at 645, replacing the common law subjective standard with an objective standard that allows liability only where the official violates 'clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, supra, 457 U.S., at 818. This change was specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves that goal," Malley, 475 U.S., at 341 see also Mitchell v. Forsyth, 472 U.S. 511, 524, 105 S.Ct. (1985). Accordingly, it satisfies one of the principal concerns underlying our recognition of absolute immunity. See, e.g., Imbler, 424 U.S. at 419 (further citation omitted).

Burns v. Reed, 111 S. Ct. at 1944, 1944 nt. 8

Moreover, the concurring Justices in Burns went one step further, pointing out the historical and legal errors in the Imbler opinion, in particular the complete lack of common law precedent for prosecutorial immunity for any out of court acts, and raising serious questions concerning the continued vitality of Imbler in circumstances which extend beyond actual in-court conduct, 111

S.Ct. at 1945-49; 1949.[9]

I. THE SEVENTH CIRCUIT'S EXTENSION OF ABSOLUTE PROSECUTORIAL IMMUNITY TO CLEARLY INVESTIGATIVE ACTS IS IN CONFLICT WITH THIS COURT'S DECISION IN BURNS, AND WITH NUMEROUS DECISIONS IN THE MAJORITY OF THE COURT OF APPEALS; IS INCONSISTENT WITH THE FUNCTIONAL APPROACH ARTICULATED BY THIS COURT IN BUTZ AND FORRESTER; AND IS AN UNWARRANTED EXTENSION OF IMBLER

Petitioner alleged in his complaint that the Respondent prosecutors, in conspiracy with defendant sheriff's police and Respondent witnesses, performed numerous investigative acts, some of which predated any judicial proceedings by nearly a year. These acts included the interrogation of plaintiff Buckley, his co-defendants, and certain witnesses, and the manufacture of phony bootprint evidence. Petitioner further alleged that these prosecutors performed other police functions in conspiracy with the police defendants by deciding to arrest and imprison him, by causing his arrest and imprisonment, and by repeatedly continuing his arrest and imprisonment, even after the jury hung, and after an admitted serial child murderer confessed to committing the crime by

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[9]The procedural history of the Buckley case in this Court, as well as its October 7, 1991 order in Buckley, when considered in light of Burns, also supports plaintiff's position that this Court sought more than a cursory "revisitation" and reinstatement of the original opinion when it vacated the majority's original decision. Plaintiff filed his petition for certiorari while Burns was pending before the Supreme Court, but Burns was decided before the defendants responded. In its Burns decision, this Court showed a detailed knowledge of the original Seventh Circuit decision, and chose to cite it only on a narrow holding concerning the prosecutor's in-court conduct, an issue not raised by plaintiff in his petition. The Respondents extensively argued in response that Burns supported the Buckley decision and that, based on Burns, the plaintiff's petition should be denied. In response, this Court granted certiorari on all three issues raised by plaintiff and vacated this Court's decision in light of Burns.

himself. [Comp. para. 46, 52, 58, 63] The Petitioner also alleged that the injuries caused by this investigative conduct were his false arrest and continued imprisonment.

This Court's decision in Burns clearly establishes that the conduct and acts of the Buckley prosecutors in interrogating witnesses and obtaining and/or manufacturing evidence is investigative in nature. In Burns, the prosecutor was denied absolute immunity for giving advice to police officers concerning their interrogation of the plaintiff, and for their procurement/manufacture of evidence. In Burns the manufactured evidence was a hypnotized "confession, " while in Buckley it is boot print evidence. If giving advice concerning such acts is investigative, as the Supreme Court held in Burns, then there is no doubt that the acts themselves are also investigative in nature and not entitled to absolute immunity.

The factual congruence of the two cases is remarkable. As a result of the interrogation and manufactured evidence, each plaintiff was arrested and imprisoned --- Burns for four months, Buckley for three years. Both were charged and prosecuted but neither was convicted. Burns' charges were dismissed before trial, Buckley's after. Neither seek damages from the prosecutors for the prosecution itself. Each plaintiff had probable cause determinations before "judicial" bodies -- Burns had two such proceedings before a Judge, while Buckley had one before the Grand Jury. In each instance the interrogations and manufactured evidence played a crucial role in obtaining the probable cause

determination, and therefore in their injuries. In both instances it was the prosecutor who obtained the tainted probable cause determination. The only discernible difference is that Burns was arrested just before the probable cause determination while Buckley, although previously detained, was arrested just after the determination. This is a distinction without moment, since both sets of prosecutors are alleged to have decided to make, and directed their respective arrests.

Nonetheless, Buckley was found to have no action against his prosecutor for his three year imprisonment, while Burns may collect from her prosecutor for her imprisonment. The only explanation for this completely inconsistent and unfair result is found in the Buckley majority's insistence upon again engrafting an injury requirement into the functional conduct analysis, even after this Court vacated its original attempt to do so. That this analysis should not have survived Burns is underscored by the Burns Court's unanimous decision to reject the prosecutor's request for immunity for out of court investigative activity despite the fact that plaintiff Burns' injury --- false arrest and imprisonment --- occurred after judicial proceedings had commenced and as a result of two separate judicially determined probable cause determinations. The Burns decision therefore strongly supports Buckley's position that these prosecutorial acts are investigative, and that the timing and locus of the injury does not effect that determination.

Moreover, even if the panel's "injury" analysis is accepted,

it still cannot lead to the grant of absolute immunity afforded the prosecutor. The injury asserted -- arrest and imprisonment -- is the result of numerous acts -- investigative interrogations, procurement and the manufacture of bootprint evidence, the decision to empanel a grand jury, the presentation of this evidence to the grand jury, the decision to indict and arrest the plaintiff, and his actual arrest. Hence, the injury was at least equally caused by the non-immunized investigative acts as it was by the arguably immunized ones. Moreover, the petitioner could not have been indicted, arrested and imprisoned but for the non-immunized acts - if the evidence had not been manufactured, the grand jury would not have indicted Buckley. The converse is not equally true --the prosecutors could have arrested and imprisoned the plaintiff without indicting him by obtaining an arrest warrant or directing the defendant police to arrest plaintiff on the basis of the interrogations and manufactured evidence. Hence, the causation of the injury is at least equally attributable to the non-immunized acts as to the arguably immunized ones.[9]

Similarly, Petitioner's allegations of conspiracy defeat the majority's injury theory. A defendant need not personally cause an injury or even commit an overt act to be held liable in a §1983 conspiracy. See e.g. Hampton v. Hampton, 600 F.2d 600 (7th Cir. 1979) Here, the Respondent prosecutors committed non-immunized

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[9]Moreover the prosecutors' non immunized investigative acts also led to their press conference and provided a basis for another non immunized form of injury -- out of Court defamation. [See Argument II and III below]

investigative acts in furtherance of the conspiracy and the conspiracy continued with further non-immunized acts by the defendant sheriff's police and others. This continuation of the conspiracy directly caused the three years of false imprisonment suffered by the Petitioner. Thus, even if the prosecutor's acts with regard to the grand jury are immunized, they can still be liable for the injuries caused by that conspiracy --even if the injuries were caused in part by the arguably immunized acts.

Petitioner in the instant case has alleged a series of clearly investigative acts by prosecutors - particularly interrogation of suspects and acquiring opinion evidence concerning the crucial bootprint -- acts that commenced directly after the crime was committed, months before a grand jury was convened, and a year before anyone was arrested or charged with an offense. The majority's holding, that these acts are not investigative, and its rationale therefore also conflict with numerous decisions in this and other Circuits, most particularly Barbera v. Smith, 836 F.2d 96 (2d Cir. 1987) which held that the function of acquiring evidence jointly with law enforcement officials, prior to arrest and prosecution, is an investigative function, which does not require absolute immunity. See also Hampton v. Hanrahan, 484 F.2d 601 (7th Cir. 1973); Briggs v. Goodwin, 569 F.2d 10, 23 (D.C. Cir. 1977), cert. den. 98 S.Ct. 3089 (1978); Forsyth v. Kleindeinst, 599 F.2d 1203, 1215 (3rd Cir. 1979); Guerro v. Mulhearn, 498 F.2d 1249 (1st Cir. 1974); McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); and Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989).

Therefore, this important conflict should be resolved by this Court, in light of its decision in Burns.

II. THE SEVENTH CIRCUIT'S HOLDING THAT PREJUDICIAL OUT OF COURT PUBLIC STATEMENTS BY A PROSECUTOR ARE CLOAKED WITH ABSOLUTE PROSECUTORIAL IMMUNITY, IS, BY THE SEVENTH CIRCUIT'S OWN ADMISSION, IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THE ELEVENTH CIRCUIT; IT IS IN CONFLICT WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS, AND WITH THIS COURT'S DECISIONS IN BURNS V. REED AND PAUL V. DAVIS; AND IS AN UNWARRANTED EXTENSION OF THIS COURT'S HOLDING IN IMBLER V. PACHTMAN

The Petitioner also alleged that the Respondent prosecutors, including Fitzsimmons, Knight, and Ryan, orchestrated and participated in a publicity campaign which defamed him and prejudiced him in the community, with the jury venire, and with the trial judge, leading to a hung jury, rather than an acquittal, and the continuation of an unreasonably high bail for two years thereafter. This campaign included pretrial statements by Respondent State's Attorney Fitzsimmons while announcing Petitioner's indictment in which he adjudged him guilty, emphasized the phony bootprint evidence, falsely accused the Petitioner of being part of a burglary ring, and caused his mug shot to be circulated. Later statements, all made by these same Respondents or at their behest, while Petitioner was either on trial or in custody awaiting retrial, reiterated that he was guilty, and attempted to discredit the confession of Brian Dugan, who had admitted that he alone had committed the crimes.

The majority of the Court of Appeals held that the Respondents were entitled to absolute prosecutorial immunity for all of the

statements which it considered,[10] holding that if the injury took place during the judicial process, neither the nature of the act nor its situs mattered. To do this, the Court again shifted the focus of the injury from the conduct to the locus of part of the plaintiff's injury. For all the reasons argued above, this analysis is erroneous under this Court's decision and rationale in Burns, and its subsequent order in Buckley.

Additionally, even if the majority's injury theory is accepted, plaintiff has alleged several injuries which were caused by this administrative conduct -- out of court defamation plus extended imprisonment occasioned by this prejudicial publicity. This injury both satisfies the defamation plus test of Paul v. Davis, 424 U.S. 693 (1976) and provides a significant portion of the plaintiff's injury to be untainted in any way by the judicial process. Therefore plaintiff has alleged administrative conduct by the prosecutor which led to an injury which, at least in part, was unrelated to the judicial process. Hence absolute immunity is not appropriate even under the majority's injury rationale.[11]

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[10]The Court affirmed, without comment, the District Court's dismissal of the claim against Knight, Ryan and King which was based on their public statements and participation in the publicity campaign; while it refused under Rule 54(b) FRCP, and 28 U.S.C. Sec. 1292 to accept jurisdiction of Petitioner's appeal of the District Court's dismissal of the claims against Fitzsimmons for his subsequent statements.

[11]The majority, on remand, 952 F.2d at 967, refused to address this issue because it was purportedly not raised by Petitioner in his original Petition for Certiorari. Certainly it was sufficiently raised under Question #1 of the Petition; see City of Oklahoma City v. Tuttle, 478 U.S. 808, 814 nt. 2 (1985). Even if it were not, however, it is well within this Court's power to correct fundamental errors of law or fact which wrongfully impact

Moreover the majority's original decision below itself recognized that their decision created a direct conflict between itself and the Eleventh Circuit, in the cases of Stepanian v. Addis, 699 F.2d 1046 (11th Cir. 1983) and Marx v. Gumbinner, 855 F.2d 783 (11th Cir. 1988):

> Stepanian and Marx hold that prosecutors do not have immunity when announcing indictments. These cases ask whether a press conference is "quasi-judicial", an approach different from Imbler's. Neither Stepanian nor Marx identifies any constitutional wrong independent of the conduct of the litigation. We therefore respectfully disagree with the eleventh circuit.

919 F.2d 1243

This decision is also in conflict with previous decisions in five other Circuits. See: Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984) (Petitioner alleged a publicity campaign by prosecutors to deprive him of his right to fair trial by disclosing secret evidence that had been presented to the grand jury; the Second Circuit, finding that a prosecutor's dealings with the press were administrative, held that there was no absolute immunity for a prosecutor's "extraneous statements to the press designed to gain unfair advantage at trial."); Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989) ("A prosecutor's public statements regarding criminal proceedings are not protected by absolute immunity because they are not quasi-judicial acts."); Helstoski v. Goldstein, 552 F.2d 564, 566 (3rd Cir. 1977) (no absolute immunity for a prosecutor's deliberate leaks to the press in investigation leading

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on a parties' rights, even if not properly preserved. cf: City of Oklahoma City v. Tuttle, 471 U.S. at 815-816.

to prosecution); Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981) (no absolute immunity for distributing extraneous statements to the press); Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976) (no absolute immunity for prosecutor's public statements after a criminal charge had been dismissed); and Marrero v. City of Hialeah, 625 F.2d 499, 511 (5th Cir. 1980) (authorized public statements by a prosecutor, and the public interest in information concerning the affairs of government, are amply protected by qualified immunity); see also Martin v. Merola, 532 F.2d 193, 195-198 (2d Cir. 1975) (5th Cir. 1980) (Lombard, concurring). Since the majority reinstated its original decision in toto after remand, the same conflict remains to be resolved by this Court.

Additionally, the majority turned sharply from what was previously its own leading case on this point, Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), a case, where, as here, there was a prosecutorial publicity campaign which resulted in "pretrial p. judice." 600 F.2d 632 Moreover, both the panel and the entire Court below were sharply divided on this issue. Specifically Senior Judge Fairchild, in dissent, recognized that the majority had strayed from the functional approach which this Court had followed in Butz v. Economu, 438 U.S. 478, 511-12 (1978) and Forrester v. White, 484 U.S. 219, 227 (1988), and had granted a prosecutor absolute immunity for administrative, rather than prosecutorial, acts. In addition two judges in regular active service voted to rehear the case en banc on this issue, even before this Court's vacated decision in Burns and its subsequent order to

vacate the majority's original decision.

This decision grants a prosecutor absolute immunity in an area expressly left open by this Court's decision in Imbler v. Pachtman, 424 U.S. 409, 430-1 (1976), and directly contradicts the approach and rationale for granting such immunity, as subsequently reiterated in Butz, Forrester, and Burns. Additionally, it is in direct conflict with all the Courts of Appeals which have addressed this issue.

In Burns, this Court recognized the importance of addressing prosecutorial conduct which the Imbler decision expressly left open. As a result, this Court sharply limited the Seventh Circuit's extension of prosecutorial immunity to investigative acts. It is equally important for this Court to consider the Seventh Circuit's unwarranted extension of immunity to administrative acts by a prosecutor. Therefore, this Court should grant the Petition as to this question.

III. THE COURT OF APPEALS' GRANT OF ABSOLUTE WITNESS IMMUNITY TO FORENSIC "EXPERTS" FOR NON-TESTIMONIAL ACTS IS AN UNWARRANTED EXTENSION OF THIS COURT'S DECISION IN BRISCOE V. LAHUE, AND IS IN CONFLICT WITH THE SECOND CIRCUIT'S DECISION IN WHITE V. FRANK AS WELL AS WITH THE RATIONALE OF BURNS V. REED

The Petitioner also alleged that the three Respondent bootprint "experts", acting individually and in conspiracy with Respondent prosecutors and Defendant sheriffs' police, manufactured falsely inculpatory bootprint evidence by rendering false, erroneous and incomplete opinions that supported, to one degree or another, the prosecutors' false assertions that Petitioner's boot print matched the one found on the door at the scene of the crime.

These alleged acts were non-testimonial in nature -- making and altering reports, and rendering and changing their opinions at the behest of the prosecutors -- and were constructed and communicated to their co-conspirators out of court long before the Petitioner was indicted. The Court of Appeals held, however, that because the most inculpatory of these reports and opinions were ultimately read to the grand jury or testified to at trial, witness immunity cloaked these Respondents for all these non-testimonial conspiratorial acts.

This holding permits a witness to launder his non-testimonial acts by later presentation of portions to a judicial body and is an unwarranted extension of Briscoe v. Lahue, 460 U.S. 325 (1982), which immunizes only the testimonial act itself, rather than the conspiracy and non-testimonial acts in furtherance. This distinction is underscored by the fact that the conspiracy here is one to falsely arrest and imprison, which includes much more than mere testimony; the granting of absolute immunity in such circumstances places it in conflict with the Second Circuit's decision in White v. Frank, 855 F.2d 956 (2nd Cir. 1988).

Additionally the panel in Buckley again utilized its injury theory to afford these Respondents absolute witness immunity for this out of court conduct. The application of the injury analysis to this conduct, in light of this Court's decision in Burns and the its subsequent decision in Buckley, is equally wrong here, for the same reasons as set forth in the arguments above. Moreover, as Justice Scalia demonstrated in his concurrence in Burns, witness

immunity flows from common law defamation immunity, which was clearly limited to in-court statements. Here the statements, in the form of opinions and reports, were clearly out of court statements not covered by absolute immunity.

Also, even if the majority's injury theory is accepted, the injury alleged by plaintiff against these defendants includes out of court defamation -- when the prosecutor used their false and manufactured evidence in his press conference and publicity campaign -- as well as in effecting his arrest and imprisonment. The former is clearly unconnected to the judicial process in any way, while the latter was at least equally caused by the out of court use of this "evidence" as the basis for the decisions to arrest, imprison, and continue plaintiff's imprisonment, as it was by the entry of some of this "evidence" into the judicial process before the grand jury. In addition, like the prosecutor's conduct, these out of court acts in furtherance of the conspiracy cannot be immunized, ex post facto, by the situs and nature of a portion of injury caused by the acts. For all these reasons, the Court should grant the Petition on this issue as well.

CONCLUSION

For all the above reasons, Petitioner respectfully urges this Honorable Court to grant his Petition for a writ of certiorari on all the issues raised herein.

Respectfully submitted,

Dated: April 1, 1992

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affirmative act of withdrawal, of which there is no suggestion in this case, terminate their participation in the conspiracy. *United States v. Patel*, 879 F.2d 292 (7th Cir.1989); *United States v. Borelli*, 336 F.2d 376, 388–89 (2d Cir.1964).

[8] Is there a similar rule for coparticipants in an illegal enterprise—"co-schemers," as the government calls them? Or for aiders and abettors? But how does one withdraw from an agreement that one is not a party to? For you can be an aider and abettor of an offense without being a co-conspirator of the principal offender, if for example you assist the offender without having agreed to do so—he might not even be aware of your assistance. *United States v. Krogstad*, 576 F.2d 22, 29 (3d Cir.1978). It would not follow that your liability for his acts would be as extensive as if there had been a conspiracy, *United States v. Blitz*, 533 F.2d 1329, 1346–47 (2d Cir.1976)—though there is plenty of authority that it would. *United States v. Sellers*, 483 F.2d 37, 45 (5th Cir.1973), and cases cited there.

The government's only response to these conundra has been to cite three cases (two in its brief, one at oral argument), without disclosing that these are conspiracy cases rather than cases involving either the conducting of an illegal enterprise or aiding and abetting. A litigant who fails to press a point by supporting it with *pertinent* authority, or by showing why it is a good point despite a lack of supporting authority or in the face of contrary authority, forfeits the point. *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 795 (7th Cir.1989); Fed.R.App.P. 28(a)(4). We will not do his research for him. *Sanchez v. Miller*, 792 F.2d 694, 703 (7th Cir.1986). The principles of waiver apply to the government in criminal cases as much as to a private party in civil litigation. *United States v. Malin*, 908 F.2d 163, 167 (7th Cir.1990); *United States v. Woods*, 888 F.2d 653, 654 (10th Cir.1989); *cf. Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990). We would not, in a case to which no previous cases were pertinent, consider a litigant to have waived his challenge merely because he had cited cases that were not on point: for it is the rare lawyer who will acknowledge that he has no cases to cite. But having found no *cases* on point the government could still have given us *reasons* for extending the conspiracy cases to cases of aiding and abetting or of conducting an illegal enterprise. The government's submission is limited to three cases that do not stand for what the government claims they stand for. That is not enough to preserve the point. Janis is entitled on retrial to a statute of limitations instruction.

He also questions the denial of his motion to sever his case from Giovannetti's, but the issue is moot because the new trial that we are ordering will have but one defendant: Janis. To summarize, then, Giovannetti's conviction is affirmed, but Janis's conviction is reversed and the case is remanded for a new trial for him in conformity with the principles set forth in this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Stephen BUCKLEY,
Plaintiff-Appellee-Cross-Appellant,
v.
J. Michael FITZSIMMONS, et al.,
Defendants-Appellants-Cross-Appellees.
Nos. 89-2441, 89-2899 and 89-2900.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 27, 1990.
Decided Dec. 5, 1990.
As Amended on Grant of Certification Jan. 14, 1991.

Arrestee brought § 1983 action against state's attorney, county sheriff, and others, claiming malicious prosecution. The United States District Court for the Northern District of Illinois, Eastern Division, Harry D. L judgment in favo absolute immunity state's attorney ir in a press confere en. The Court o Circuit Judge, hel verse to arrestee v locutory appeal; (entitled to absolu to press conferenc as to whether pros coercive interrogat would be subject only; and (4) expe tled to absolute im

Appeals dismis part, vacated and r

Fairchild, Senio ed in part and conc opinion.

1. Federal Courts
Immediate appe der refusing to affo suit for damages a prosecution. 28 U.

2. Federal Courts
Unless a distr judgment on an ent the case with respec a particular party, F mit an immediate a Proc.Rule 54(b), 28

3. Federal Courts
A "claim" for p means factually or ments of a case. F 54(b), 28 U.S.C.A.

See publication for other judicial definitions.

4. Federal Courts
In determining appeal under Rule claims which are app are retained must Fed.Rules Civ.Proc.R

sion, Harry D. Leinenweber, J., entered judgment in favor of officials, based on absolute immunity, except as to action of state's attorney in announcing indictment in a press conference. Appeals were taken. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) decisions adverse to arrestee were not subject to interlocutory appeal; (2) state's attorney was entitled to absolute immunity with respect to press conference; (3) fact issue existed as to whether prosecutors had engaged in coercive interrogation of defendant, which would be subject to qualified immunity only; and (4) expert witnesses were entitled to absolute immunity.

Appeals dismissed in part, affirmed in part, vacated and remanded in part.

Fairchild, Senior Circuit Judge, dissented in part and concurred in part, and filed opinion.

1. Federal Courts ⇐574
Immediate appeal is available from order refusing to afford absolute immunity in suit for damages arising out of criminal prosecution. 28 U.S.C.A. § 1291.

2. Federal Courts ⇐660.10, 660.20
Unless a district court enters final judgment on an entire claim, or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. Fed.Rules Civ. Proc.Rule 54(b), 28 U.S.C.A.

3. Federal Courts ⇐660.20
A "claim" for purposes of Rule 54(b), means factually or legally connected elements of a case. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts ⇐660.20
In determining whether interlocutory appeal under Rule 54(b) is permissible, claims which are appealed and those which are retained must be factually distinct. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

5. Federal Courts ⇐660.20
Question whether a county was liable for the acts of a state's attorney in a § 1983 malicious prosecution action could not be raised in a Rule 54(b) interlocutory appeal; regardless of how Court of Appeals ruled on whether the state's attorney could determine policy for the county, so as to make county liable, same question would later recur in connection with conduct of county sheriff, and judicial economy indicated that both issues should be appealed at the end of case. Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

6. Federal Courts ⇐660.20
Defendant in murder case was not entitled to interlocutory appeal under Rule 54(b) from decision that various acts of state's attorney, county sheriff and other officials alleged to be malicious prosecution were subject to absolute immunity; judgment was not final as to him since court had ruled in defendant's behalf on one of his claims and the claims were not factually distinct so as to be separable for purposes of rule. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.

7. Federal Courts ⇐660.5
State's attorney was entitled to interlocutory appeal under Rule 54(b) of the trial court ruling in a § 1983 case that prosecutor holding press conference to announce the indictment in murder and rape case was not entitled to absolute immunity; order was "final" as to him, as required under rule, as other questions of absolute immunity had been decided in his favor and except for ruling appealed he would have been out of the case. Fed.Rules Civ.Proc. Rule 54(b), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

8. Federal Courts ⇐770
Doctrine of pendent appellate jurisdiction did not authorize Court of Appeals review of § 1983 claimant's contentions that certain activities by state's attorney, county sheriff and others in a murder case were not subject to absolute immunity, in connection with interlocutory review of district court decision that one instance of

Appendix A

official action did not qualify for such immunity. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.; 42 U.S.C.A. § 1983.

9. Federal Courts ⇐660.30

Trial court's certification, under § 1292(b), that interlocutory appeal would materially advance ultimate termination of litigation, made after oral argument in § 1983 malicious prosecution case during which jurisdiction to entertain interlocutory appeal was called into doubt, was too late to provide basis for jurisdiction. Fed.Rules Civ.Proc.Rule 54(b), 28 U.S.C.A.; 28 U.S.C.A. §§ 1291, 1292(b); 42 U.S.C.A. § 1983.

10. District and Prosecuting Attorneys ⇐10

If an injury inflicted by a public employee on a criminal defendant flows from the initiation or prosecution of the case, then prosecutor is absolutely immune from civil suit and defendant must look to the court in which case pends to protect his interests; if however a constitutional wrong is complete before the case begins, then prosecutor should be treated as police detective would be in like circumstances by being extended qualified rather than absolute immunity. 42 U.S.C.A. § 1983.

11. District and Prosecuting Attorneys ⇐10

Absolute immunity from civil suit extended to state's attorney calling press conference to announce indictment of defendant in case involving kidnapping, rape and murder, and to express his belief that boot print found at site of kidnapping matched boot owned by defendant; incident related to the initiation of prosecution. 42 U.S.C.A. § 1983.

12. Civil Rights ⇐214(9)

State attorney and assistant prosecutors were absolutely immune in civil rights litigation alleging malicious prosecution in a murder case, with respect to their conduct of investigation and presentation of case to grand jury. 42 U.S.C.A. § 1983.

13. Civil Rights ⇐214(9)

Prosecutors were entitled to absolute immunity, in civil lawsuit alleging malicious prosecution, with respect to conversations with experts in kidnapping, rape and murder case as to whether boot print found at site of kidnapping was made by boot owned by defendant. 42 U.S.C.A. § 1983.

14. Civil Rights ⇐214(9)

Qualified rather than absolute immunity from suit would apply in a civil rights deprivation suit, with respect to allegedly coercive interrogation of criminal suspect prior to the beginning of judicial process, provided that constitutional violation is complete and causes injury out of court. 42 U.S.C.A. § 1983.

15. Civil Rights ⇐214(9)

Prosecutor would not lose right to absolute immunity in civil rights deprivation prosecution by criminal defendant, simply by virtue of conducting interrogation without giving of *Miranda* rights; violation does not occur when interrogation takes place, but rather if and when statements are used in criminal proceedings. 42 U.S.C.A. § 1983.

16. Federal Civil Procedure ⇐2491.5

Material issues of fact, precluding summary judgment in case involving alleged deprivation of arrestee's civil rights, existed as to whether state's attorney, sheriff and others had carried on coercive interrogation of arrestee, so as to be entitled only to qualified rather than absolute immunity. 42 U.S.C.A. § 1983.

17. Malicious Prosecution ⇐42

Witnesses who had testified, in kidnap, rape and murder case, as to whether boot print found at site of kidnapping was from boots belonging to arrestee, were entitled to absolute immunity from suit brought by arrestee charging malicious prosecution. 42 U.S.C.A. § 1983.

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mons.

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James R. Schirott, M
Schirott & Associates, I
Schwarm, Asst. Atty. (
for defendants-appellee
Patrick King, James Ry
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Before WOOD, Jr., a
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Kan., for defendant-appellant County of DuPage.

Charles E. Hervas, Phillip A. Luetkehans, James G. Sotos, James R. Schirott, Michael W. Condon, Schirott & Associates, Itasca, Ill., Steve A. Schwarm, Asst. Atty. Gen., Office of Atty. Gen., Topeka, Kan., for defendant-appellant J. Michael Fitzsimmons.

Charles E. Hervas, James G. Sotos, James R. Schirott, Michael W. Condon, Schirott & Associates, Itasca, Ill., Steve A. Schwarm, Asst. Atty. Gen., Topeka, Kan., for defendants-appellees Thomas Knight, Patrick King, James Ryan and Robert Kilander.

Before WOOD, Jr., and EASTERBROOK, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

EASTERBROOK, Circuit Judge.

Probable cause is enough to initiate a criminal prosecution. It takes proof beyond a reasonable doubt to convict. That difference, together with uncertainties in what the evidence will show, implies that some innocent persons will be prosecuted. Trial is supposed to filter out the innocent, a task it serves well if imperfectly.

Accusation and trial are wrenching experiences, especially for the innocent. On top of trauma comes expense and often the loss of freedom pending disposition. How should society respond when an innocent person is prosecuted? Apologies are mild balm at best. Money is more effective. Compensation not only would aid the involuntary participant in the criminal justice system but also would induce prosecutors to evaluate cases more carefully, taking account of the costs to the defendants. Yet prosecutors rarely apologize, and states do not compensate defendants acquitted by the jury, or against whom charges are dropped. Often neither apology nor compensation is in order, because the suspect is guilty but for one reason or another is not convicted. Sometimes both are called for, but they are almost never forthcoming.

Innocent defendants, rightly feeling put upon, may respond to this governmental indifference by turning on their accusers, making them defendants in turn. They demand that the prosecutors, police, and witnesses dig into their own pockets to provide recompense. If courts could quickly and reliably identify malicious prosecutions, those in which the case was manufactured or conviction unattainable, it might make sense to award damages, to cause prosecutors with the power to destroy others' lives to do their jobs with the care that their responsibilities require. But the legal system is neither quick nor infallible. To allow a search for malicious or weak prosecutions is to license litigation at any defendant's option. And if malicious prosecutions are rare, then even a low rate of error in suits against prosecutors will lead to more false positives than to vindication of just claims. Given the error inevitable in our legal system—in criminal prosecutions as well as in follow-on civil litigation—a system of personal liability for prosecutors and witnesses would do more to discourage the activity of criminal prosecution (or testifying) than to make the prosecutors and witnesses more careful and honest. Because criminal prosecutions regularly do more good than bad, and because prosecutors have no way to use these social benefits to offset the damages they could be called on to pay when their activities injure the innocent, courts have concluded that both prosecutors and witnesses generally are immune from damages on account of errors. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983).

How far does this immunity extend? Does it cover the process of investigating and evaluating a case as well as the trial itself? If so, it could throw a blanket of immunity over acts that may lead to liability when performed by police, see *Jones v. Chicago*, 856 F.2d 985 (7th Cir.1988); *Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988), decision after remand under the name *Smith v. Chicago*, 913 F.2d 469 (7th Cir.1990). If not, criminal defendants can evade the immunity established by *Imbler*

by asserting that, before the trial began, the prosecutors prepared to do precisely what they did. That would create the same risk of error, and exposure to retaliatory counterstrikes, that *Imbler* and *Briscoe* are meant to avert. We must decide how far immunity doctrines extend in a world in which the most logical option, governmental liability, may well be closed by *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

I

Jeanine Nicarico, 10 years old, was home with the flu on Friday, February 25, 1983. Her mother Patricia, a teacher, came home to fix lunch for Jeanine, then returned to school. Not long after that someone kicked in the front door to the Nicarico home, trussed Jeanine up in bedclothes, and carried her off. Marks on the walls and door jamb bore mute witness to her efforts to resist. The intruder took no valuables—nothing other than the blanket and its occupant. *People v. Hernandez*, 121 Ill.2d 293, 117 Ill.Dec. 914, 915–16, 521 N.E.2d 25, 26–27 (1988).

The kidnapper drove Jeanine into the country and pulled her nightgown over her head. Unsuccessful in a determined attempt to penetrate her vagina, the kidnapper raped Jeanine in the anus. Now he became her assassin. He caved in her skull with five blows from a tire iron or baseball bat and threw her into the mud 45 feet off the Illinois Prairie Path, a hiking trail. Jeanine died within four hours of the time she ate lunch with her mother. The police found the body on February 27, and the manhunt began.

John Sam, the detective with the DuPage County Sheriff's Police leading the investigation, concentrated on the principal clue the intruder left behind: a clear print (the "bootprint") of the sole of a shoe appeared on the Nicaricos' door. While other detectives interviewed neighbors and persons who might have seen the kidnapper drop Jeanine's body near the trail, Sam tried to find the owner of the shoe. A $10,000 reward attracted Alex Hernandez, a petty thief with low intelligence and a desire to become a police officer. Hernandez said that he overheard a conversation between Stephen Buckley and "Ricky" in which "Ricky" talked about the crime. Sam tracked down Buckley, an unemployed high school dropout. Buckley admitted having shoes with soles like those in the bootprint on the door. He brought them to Sam for analysis.

John Gorayczyk, the head of the identification section in the DuPage County crime laboratory, decided that Buckley's shoes did not match the bootprint: the soles were the same, but the heels were a little different. Edward R. German, a forensic scientist in the Illinois state crime laboratory, was only a little more positive: he concluded that Buckley's shoe "could have at best" made the print. Prosecutors then sent the shoe to Robert Olsen, with the Kansas Bureau of Identification, who concluded that Buckley's shoe "probably" matched the marks on the door. Prosecutors also brought in Louise Robbins, a professor of anthropology at the University of North Carolina at Greensboro. Robbins, who later testified that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes, concluded that Buckley positively made the marks on the Nicaricos' door.

Meanwhile the investigation was proceeding on other fronts. Two witnesses—one near the Nicaricos' house, another near the Prairie Path—identified Buckley as the driver of a green Ford Granada, missing a hubcap, that left the neighborhood and arrived at the Prairie Path at the right times. These witnesses were positive, even though their earlier descriptions did not match Buckley's features. (One of them initially told police that the driver, in his late 20s or early 30s, wore granny glasses and was clean shaven; Buckley, 20, had a mustache and does not wear glasses.) Hernandez said that he took some role in Jeanine's abduction and implicated Rolando Cruz, who also confessed (although neither to the rape nor to the murder); both said that Buckley drove the car. Neither Cruz nor Hernandez, both of whom have substantially below average intelligence, could give

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John Sam arrested Buckley, Cruz, and Hernandez, and they were put on trial for their lives. But Sam began to question the conclusion that the three did it—partly because of discrepancies in the identifications and other details (witnesses reported only a single person in the car); partly because none of the three had a record of sex offenses; partly because Cruz and Hernandez contended that they came to burgle the Nicarico house and took some items, though nothing was missing; but mostly because he was convinced that men who violate little girls do not work in teams. Sex crimes he had solved were solitary aggressions. Sam told his superiors they had the wrong defendants. When they would not listen, Sam quit the force and offered to testify for the defense. James Tuohy, *The DuPage Cover-Up*, Chicago Lawyer 1, 9–14 (May 1986).

A jury convicted Cruz and Hernandez of murder, among other crimes, and the judge sentenced both to death. It was unable to reach a verdict about Buckley, and the prosecutor scheduled a second trial. While prosecution and defense were preparing for retrial, police in LaSalle County arrested Brian Dugan for the abduction, molestation, and murder of 7 year old Melissa Ackerman. Discussing the charges with his lawyer, Dugan admitted two other rape-murders: Donna Schnorr and Jeanine Nicarico. He furnished details for each, many of which had never been publicized. He also told his lawyer that after killing Jeanine he threw away the shoes he wore. Soles of the shoe style Dugan says he bought at a Fayva store matched the bootprint at least as closely as Buckley's, probably better. A farmer in the area where Jeanine's body was found recalls plowing up a pair of boots in 1983.

Dugan, 29, had a history of violent sex offenses, always solitary. His lawyer used the admissions and a willingness to plead guilty to all three crimes to avoid the death penalty. Dugan would give no statement creating a risk of capital punishment. LaSalle County made the deal, and Dugan is in jail for life on account of the Schnorr and Ackerman slayings. But prosecutors in DuPage County refused to accept Dugan's offer, concluding that his admissions were unreliable. Although Dugan furnished many details that checked out, he also claimed that Jeanine was so well bound that she did not grab anything as they left; the walls of the Nicarico house testified to the contrary.

As DuPage County was preparing to put Buckley on trial a second time, Louise Robbins died. No one else was willing to testify that the bootprint inexorably showed Buckley's guilt. James Ryan, State's Attorney for DuPage County, dismissed the charges against Buckley. He was released in March 1987 after three years in prison; he had been unable to post the $3 million bond. In January 1988 the Supreme Court of Illinois reversed the convictions of Cruz and Hernandez on the basis of *Bruton* violations at trial: the prosecutor introduced each man's confession implicating the other, and the substitution of euphemisms for names did nothing to hide the accusations from the jury, the court held. *Hernandez*, 117 Ill.Dec. at 21–26, 521 N.E.2d at 32–37; *People v. Cruz*, 121 Ill.2d 321, 117 Ill.Dec. 907, 521 N.E.2d 18 (1988). See also *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987) (rejecting the interlocking confessions exception to *Bruton*). The court did not forbid retrial, concluding that the evidence is sufficient to allow a jury to find guilt. Cruz and Hernandez were retried. Cruz was convicted and has again been sentenced to death. Hernandez's case was mistried because the jury could not agree; Ryan has announced that he will take Hernandez to trial a third time.

Buckley filed this suit under 42 U.S.C. § 1983 in 1988. He contends that almost everyone connected with the investigation and prosecution violated his constitutional rights and should be made to pay damages. J. Michael Fitzsimmons, State's Attorney for DuPage County at the time of Buckley's indictment, is the lead defendant. Ryan is among the other defendants, who include the Sheriff of DuPage County, many members of the Sheriff's police,

many prosecutors on the State's Attorney's staff, three experts who analyzed the bootprint (German, Olsen, and Robbins), and DuPage County itself.

Everyone who had anything to do with this prosecution, other than Sam and Gorayczyk, has a place in Buckley's rogues' gallery. His complaint contends that all participated in a conspiracy to execute him, although all knew that he is innocent. The ringleader, as Buckley sees things, is Fitzsimmons, who wanted to solve the Nicarico murder to boost his popularity. State's Attorney since 1976, Fitzsimmons was running against Ryan in the Republican primary in spring 1984. To give his campaign a boost, the complaint alleges, Fitzsimmons convened a special grand jury and instructed his assistants to produce an indictment. Buckley narrates a tale of coercive interrogations in 1983 and 1984 by police and prosecutors, arm-twisting of experts that led them to "find" similarities between his shoes and the bootprint, misleading presentations to the grand jury, indictment, and stubborn refusal to dismiss the case despite Dugan's confession. Fitzsimmons announced the indictment at a press conference on March 9, 1984; Buckley maintains that this also violated his rights by turning the community against him, reducing the chance that he could obtain bail or a fair trial. The complaint is full of particulars; we take them as gospel, but the usual caveat applies.

Most of the defendants moved to dismiss the complaint on grounds of immunity, absolute or qualified. DuPage County moved to dismiss on the ground that § 1983 does not establish vicarious liability, see *Monell*, 436 U.S. at 691–95, 98 S.Ct. at 2036–38, and that neither the Sheriff nor the State's Attorney made "policy" for the County, so it could not be liable directly. The district judge delivered a split decision. 1989 WL 64321, 1989 U.S. Dist. Lexis 6689 (N.D.Ill. 1989). Ryan and all of the assistant prosecutors prevailed under *Imbler*; the judge concluded that convening the grand jury, presenting information to it, preparing the case (including the expert witnesses), and even interviewing Buckley are covered by absolute immunity. The three expert witnesses received absolute immunity under *Briscoe* and *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir.1983), for their out-of-court preparation as well as for their testimony. Fitzsimmons prevailed on all claims but one: the judge concluded that his announcement of the indictment to the press was not covered by absolute immunity. DuPage County, however, lost. Although the court concluded that state's attorneys are state rather than local officials, so that Fitzsimmons and Ryan were not policymakers for the county, it concluded that the sheriffs are final policymakers for their counties. Acts of the Sheriff therefore could be the basis of liability for DuPage County, *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), and the court retained the county in the case.

At this point the county, Fitzsimmons, the Sheriff, and members of the Sheriff's police remained as defendants. It was time to start discovery. Instead, almost everyone appealed. Naturally the first question is appellate jurisdiction.

II

[1] Fitzsimmons' appeal from the order refusing to accord him absolute immunity is within our jurisdiction on the authority of *Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982), which holds that the denial of a substantial claim of absolute immunity is immediately appealable under 28 U.S.C. § 1291. Jurisdiction over the other appeals depends on Fed.R.Civ.P. 54(b), which allows the court to enter final judgment on particular claims or parties. At all parties' request, the district judge entered a judgment designed to allow appeals to be taken under Rule 54(b). More than a year after entering the orders, and after oral argument in this court, the district judge also certified a question for interlocutory appeal under 28 U.S.C. § 1292(b). We start with Rule 54(b).

[2] Rule 54(b) does not allow a judge to certify for interlocutory decision issues such as "Is a sheriff a policy-maker for counties in Illinois?" When an issue is

unresolved and interlocutory resolution could materially advance the termination of the litigation, § 1292(b) allows the district judge to certify the question. The court of appeals decides whether to entertain the appeal. Rule 54(b) serves a different function: carving out of a complex case individual claims that have been finally resolved. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437–38, 76 S.Ct. 895, 900–01, 100 L.Ed. 1297 (1956). Rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not change the ordinary meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be "final". *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *Horn v. Transcon Lines, Inc.*, 898 F.2d 589 (7th Cir.1990). Unless the court enters final judgment on an entire "claim", or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. E.g., *Steve's Homemade Ice Cream, Inc. v. Stewart*, 907 F.2d 364 (2d Cir.1990); *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir.1986); *Horn*, 898 F.2d at 593–95.

The district judge entered judgment in favor of Ryan, the assistant prosecutors, and the three expert witnesses. Buckley's appeal puts all of these before us. Fitzsimmons and DuPage County, however, continue to be parties in the district court. Demands against them may be brought here only if the district judge has finally determined entire "claims" for relief. DuPage County moved for dismissal on the ground that neither the State's Attorney nor the Sheriff set policy for the county. That motion was denied. The court knocked out one of Buckley's theories but refused to dismiss the claim. Further proceedings lay in store. The denial of a motion to dismiss (or for summary judgment) is not a "final" decision. More than two weeks after oral argument DuPage County moved to dismiss its appeal, agreeing with Buckley's argument, first made in his brief on the merits, that the court lacks jurisdiction; that motion is granted.

[3, 4] Jurisdiction over Buckley's appeal against Fitzsimmons and DuPage County depends on the meaning of "claim" in Rule 54(b). We understand a "claim" for purposes of Rule 54(b) to mean factually or legally connected elements of a case. *Horn*, 898 F.2d at 592. "It has seemed to us implicit in the rule that the retained and the appealed claims must be factually distinct, for otherwise the court of appeals may be forced to analyze the same facts in successive appeals, a form of piecemeal appealing not authorized by the rule." *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1366 (7th Cir.1990). The claim against Fitzsimmons remaining in the district court is factually related to the claims on which he prevailed; indeed, Buckley alleges that the announcement of the indictment and Fitzsimmons' other acts are all part of a single plan. Similarly, the claim that DuPage County set a "policy" through the decisions of the two states' attorneys is factually related to the claim that it set a policy by the decisions of the Sheriff. Buckley alleges one conspiracy, one policy, one injury.

Olympia Hotels expresses unease with the circuit's definition of a "claim", recognizing that judicial resources may be conserved rather than squandered by accelerating decision on a controlling issue, even if there is a chance that related questions could recur. Of course one cannot go too far with this recognition: jurisdiction is a question of judicial power, not of convenience. When immediate review could materially advance the termination of the litigation, § 1292(b) supplies the route but allows the court of appeals to exercise discretion, a filter missing in appeals under Rule 54(b). The rule does not allow the entry of judgments that would not be "final" within the meaning of § 1291, see *Horn*, 898 F.2d at 593–94, and a decision foreclosing one theory of liability while leaving others open is not "final" on any understanding of that term.

Still, how much factual overlap is too much is a question of degree, and *Olympia* properly observed that Rule 54(b) commits the decision on such matters to the in-

formed discretion of the district judge. 908 F.2d at 1367–68. Such discretion, thoughtfully exercised, will rarely be disturbed. Unfortunately, nothing in this record suggests that the district judge has "assess[ed] the desirability of immediate judgment and unequivocally give[n] an affirmative answer." *Local P-171 v. Thompson Farms Co.*, 642 F.2d 1065, 1073 (7th Cir. 1981). After Fitzsimmons took an appeal from the denial of his motion to dismiss, the parties presented the district judge with an "agreed order directing entry of final judgment". The judge signed this order. What the parties prepared for the judge contains no discussion of the relation between the claims finally disposed of and those remaining for decision, no appreciation of the potential for successive decision and weighing the benefits of immediate resolution against the cost to the judicial system. For all we can see, the district judge gave no consideration to systemic interests in preserving the norm of one appeal per case—and of minimizing the number of appeals if there must be more than one. Indeed, nothing suggests that the judge recognized that he was entering a "final judgment" *denying* a motion to dismiss! We have remarked before that district judges may not reflexively enter Rule 54(b) judgments just because the parties want to appeal. *Horn*, 898 F.2d at 592; see also *Glidden v. Chromally American Corp.*, 808 F.2d 621, 624 (7th Cir.1986).

[5] According to the complaint there was a single conspiracy in which the Sheriff and both State's Attorneys participated, producing a "policy" of prosecuting the innocent. Whether adopted through the Sheriff or the State's Attorneys, this single "policy" is the basis of the claim. No matter what we would say about the State's Attorney's role as a policymaker for counties in Illinois, the same set of facts would come back later concerning the Sheriff's role; legal issues also would be similar. Because governmental bodies are not entitled to official immunity, *Owen v. Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the questions about DuPage County are unrelated to the immunity issues presented in the appeals properly before us. Buckley's "claim" against the county therefore has yet to yield a "final" decision appealable under Rule 54(b). We dismiss Buckley's appeal to the extent it asks us to decide whether DuPage County may be liable on account of the State's Attorneys' decisions.

[6, 7] Buckley's appeal against Fitzsimmons encounters the same problem. Although the court concluded that Fitzsimmons has absolute immunity from liability on account of most of the incidents about which Buckley protests, it did not dismiss the claim or grant summary judgment in Fitzsimmons's favor. That is why Fitzsimmons is appealing, as he is entitled to do even though the decision is interlocutory. Buckley may appeal, though, only if the decision is "final" within the meaning of Rule 54(b), and it is not.

Is this inconsistent? Fitzsimmons's appeal depends on a conclusion that the decision denying his motion to dismiss is "final" within the meaning of 28 U.S.C. § 1291. "Finality" means the same thing under § 1291 and Rule 54(b), see *Horn*, 898 F.2d at 593–94, for the rules do not enlarge jurisdiction. See Fed.R.Civ.P. 82; Fed.R. App.P. 1(b). What is "final" about the decision, though, is only the conclusion that the case must proceed. Fitzsimmons lost his "right not to be tried" and to avoid discovery, ingredients of immunity separate from an entitlement to prevail on the merits. *Mitchell v. Forsyth*, 472 U.S. 511, 524–29, 105 S.Ct. 2806, 2814–17, 86 L.Ed.2d 411 (1985); *Helstoski v. Meanor*, 442 U.S. 500, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). Finality of this kind is a one-way street; only the holder of the "right not to be tried" may appeal, because only he experiences a "final" decision.

[8] Perhaps Buckley could invoke pendent appellate jurisdiction. That concept sometimes allows a court to consider extra issues in an interlocutory appeal. *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164 (7th Cir.1988); *Patterson v. Portch*, 853 F.2d 1399 (7th Cir.1988). We could assume jurisdiction of Buckley's appeal against Fitzsimmons only if the doc
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Fitzsimmons only if the doctrine allows the addition of *appellants* as well as *issues*. Just as pendent-party jurisdiction in the district court is harder to support than is the addition of issues, *Finley v. United States*, 490 U.S. 545, 109 S.Ct. 2003, 104 L.Ed.2d 593 (1989), so pendent-party appellate jurisdiction is especially problematic. *Abney v. United States*, 431 U.S. 651, 662–63, 97 S.Ct. 2034, 2041–42, 52 L.Ed.2d 651 (1977), tells us not to allow interlocutory appeals to acquire barnacles. Although *Abney* is a double jeopardy case, it is the foundation for the entitlement to immediate appeal when the defendant asserts a right not to be tried. Its flat conclusion that each issue, and presumably each party, must find a separate basis of appellate jurisdiction governs in other cases of the same stripe. We therefore dismiss Buckley's appeal to the extent he seeks relief against Fitzsimmons.

[9] What remains is the belated certification under § 1292(b). Just as the parties wrote for the judge a Rule 54(b) judgment, which he signed without comment, so they wrote for him a § 1292(b) certification, which again he signed without change. Again the parties' draftsmanship and timing leaves much to be desired. Here is the operative part of the order they wrote for the judge:

> In this Court's opinion, its memorandum opinion and order of June 9, 1989 involves a controlling issue of law as to which there is [sic] substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. This issue is, inter alia, whether the State's Attorney and/or Sheriff of DuPage County are county officials and/or policymakers for purposes of *Monell* liability under 42 U.S.C. § 1983.

Section 1292(b) requires the court to identify the issues, not to assert that one issue is important "inter alia"; we expect the court to *explain* why, rather than assert that immediate appeal will materially advance the disposition. Courts should do their own writing. If they allow lawyers to draft for them, they should at least see to it that the lawyers have everything in order.

There is also a deeper flaw: delay. Appeals must be taken within a short time after the entry of the orders appealed from, and § 1292(b) sets one of the shortest limits at ten days. Although Fed.R. App.P. 5(a) allows a judge to amend the ruling to add a § 1292(b) certification at any time, we held in *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir.1990), that this power must not be used promiscuously. "An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay." In *Weir* neither the parties nor the judge gave a reason for the delay; we declined to accept the appeal. So here. Judge Leinenweber is silent on the question (the parties neglected to draft for him with *Weir* in mind), and the joint motion for leave to appeal gives as a reason only the skepticism expressed at oral argument about jurisdiction under § 1291. *That* jurisdictional problem is largely attributable to the parties, and at all events the problem with the Rule 54(b) judgment was first flagged by the plaintiff's brief, filed in January 1990. Delay after that is unjustifiable, and we decline to accept an appeal from a certification made after oral argument in this court.

III

Imbler reserved all questions concerning the extent to which absolute prosecutorial immunity applies to investigation and preparation for trial. 424 U.S. at 430–31 & n. 33, 96 S.Ct. at 995–96 & n. 33. Some may be resolved this Term. *Burns v. Reed*, 894 F.2d 949 (7th Cir.), cert. granted, — U.S. —, 110 S.Ct. 3269, 111 L.Ed.2d 779 (1990). In the interim we must reach a decision influenced by the functions immunity serves.

Buckley maintains that absolute immunity is limited to the trial itself. Fitzsimmons and the other defendants submit that anything leading up to trial is within the scope of absolute prosecutorial immunity. Responding to a question at oral argument, counsel for Fitzsimmons said that prosecu-

torial immunity would be absolute even if prosecutors tortured Buckley to obtain a confession. Neither of these limiting positions can be right.

Buckley's position would turn *Imbler* into a pleading rule. Anyone wishing to challenge his prosecutors would need only challenge the investigatory and preparatory steps that precede every prosecution, throwing in the appellation "conspiracy" for good measure. Immunity is not limited to cases filed and tried without investigation or planning; why should it protect only irresponsible prosecutors? Buckley wants to relitigate the merits of the criminal charge against him and to recover damages if the charge was unfounded; prosecutorial immunity prevents turning the tables in this fashion. *Imbler*, 424 U.S. at 425, 96 S.Ct. at 992; *Butz v. Economou*, 438 U.S. 478, 512-17, 98 S.Ct. 2894, 2913-16, 57 L.Ed.2d 895 (1978); *Mitchell v. Forsyth*, 472 U.S. 511, 522-23, 105 S.Ct. 2806, 2813-14, 86 L.Ed.2d 411 (1985). See also *Yaselli v. Goff*, 12 F.2d 296 (2d Cir.1926), affirmed, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927). If absolute immunity has value—as the Supreme Court believes it does—we must prevent its evasion.

Fitzsimmons and the other defendants are wrong because immunity applies to the act not the actor. *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988). An Attorney General who approves a national security wiretap does not have absolute immunity, even though the information may lead to prosecution. *Mitchell*, 472 U.S. at 520-24, 105 S.Ct. at 2812-14. Courts regularly hold that prosecutors filling the roles of detectives must face the music for wrongs committed against suspects to the same extent as detectives do. E.g., *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir.1988); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir.1973). Police who use the third degree in interrogation, or break open doors, must show that their acts were objectively reasonable; the security of personal rights would be markedly diminished if the state could investigate at will and without risk, by shifting the same functions to lawyers. Immunity is absolute only when the prosecutor performs distinctively prosecutorial functions.

A

Because immunity follows the act rather than the actor, it is essential to define "prosecutorial" acts. Any definition must depend in turn on why courts extend immunity to prosecutors in the first place. Why not use damages to induce proper conduct in every case? Because damages would lead prosecutors to temper their judgment. Tempering might be an acceptable cost of a damages regimen if the costs of prosecutorial errors were high, but the criminal process itself offers sufficient opportunities to prevent harms, so that damages remedies are unnecessary. These considerations imply an appropriate scope of immunity.

Litigation has losers. They may "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate". *Imbler*, 424 U.S. at 425, 96 S.Ct. at 992. Even the winners may be losers. Defendants may spend days, even years, in prison awaiting trial, as Buckley did. Yet litigation would be even more difficult and costly than it is if, after the first trial, there were a second with the positions of the parties reversed. Prosecutors, whose professional duties necessarily make the lives of some uncomfortable, would be special targets. Attorneys for the government could protect themselves from retaliation by quiescence. Victims of crime cannot compel prosecution of offenders or collect damages from passive prosecutors. *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Leeke v. Timmerman*, 454 U.S. 83, 102 S.Ct. 69, 70 L.Ed.2d 65 (1981). Society does not reward prosecutors for convicting the guilty; requiring prosecutors to compensate defendants for injury inflicted without giving them a bonus for the benefits they create would create a bias; in close cases it would always pay to forego prosecution. Yet society prefers to induce such prosecutions. Putting a case before a court is no evil, even when there is reason to doubt its strength. "A prosecutor often must de-

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cide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages." *Imbler*, 424 U.S. at 426 n. 24, 96 S.Ct. at 993 n. 24.

Prosecutors should (and most routinely do) take account of the costs they inflict on others. If suits were the only way to impress prosecutors with the gravity of these costs, damages could be a necessary evil—which is why police officers and even attorneys general do not possess absolute immunity when conducting investigations. Courts can curtail the costs of prosecutorial blunders without the need for damages, however, by cutting short the prosecution or mitigating its effects. *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 674 (7th Cir.1985). "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*, 438 U.S. at 512, 98 S.Ct. at 2914. Judges are involved early on. The principal cost of wrongful prosecution is the imprisonment of the defendant before trial. Yet imprisonment depends on a demonstration of probable cause in court. *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Even after the prosecutor establishes probable cause, the judge may release the defendant on bail or ameliorate the harshness of imprisonment. Prosecutorial action is a necessary *but not sufficient* condition of imprisonment; injury will not long continue unless one or more judges is impressed with the gravity of the charge and the weight of the evidence assembled. If the evidence is enough to satisfy a judge, there is correspondingly less reason to blame the prosecutor. Of course there may be some reason; maybe the evidence has been cooked. Cf. *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Jones v. Chicago*, 856 F.2d at 994. Absolute immunity depends on a judgment that the probability of putting one over on a court is sufficiently low, and the burden of litigation afterward to determine *whether* prosecutors made up the case sufficiently high, that attempts to litigate the question should be foregone. This is a reasonable judgment when a court can step in early, curtailing the injury; it is not a sound conclusion when an act (by prosecutor or police officer) causes injury that is complete before the case reaches court. See *Mitchell*.

Prosecution causes injuries in addition to imprisonment. Accusations of crime impugn the good name of defendants. Trial is an unpleasant experience as well as an expensive one. But these injuries, too, may be curtailed by judicial action. Residual injuries have never been deemed sufficient to call for damages against public prosecutors, or even for such medicaments as interlocutory appeals. E.g., *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989); *Flanagan v. United States*, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982); *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540, 84 L.Ed. 783 (1940). Expense and inconvenience are endemic to any legal system; the costs of justice in ours do not imply either especially prompt review or damages afterward. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 244, 101 S.Ct. 488, 495, 66 L.Ed.2d 416 (1980); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S.Ct. 1028, 1040, 39 L.Ed.2d 123 (1974); *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222, 58 S.Ct. 834, 841, 82 L.Ed. 1294 (1938); *PaineWebber Inc. v. Farnam*, 843 F.2d 1050 (7th Cir.1988).

[10] All of this suggests a simple demarcation. If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests. If, however, a constitutional wrong is complete before the case begins, then the pros-

ecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity. Prosecutors who break open doors or torture suspects into confessing cause injuries that are complete outside of court, and which the judge cannot diminish (but may be able to compensate). Prosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court. *Butz*, 438 U.S. at 515–16, 98 S.Ct. at 2915–16.

Intermediate cases are not hard to imagine. Our own *Burns v. Reed* is one, in which the prosecutor gave legal advice to police who were considering whether to carry out a search. Injuries from illegal searches are felt out of court and without regard to the institution of a prosecution, which cuts against absolute immunity; on the other hand, the availability of prosecutorial advice may reduce the number of illegal searches, and allowing damages on account of bad advice may in the long run increase the number of improper searches. *Burns* will consider where the balance lies. Activities in our case may be put on one or another side of the line with greater confidence.

B

[11] Fitzsimmons announced Buckley's indictment to the press on March 9, 1984. According to the complaint Fitzsimmons informed the press about the contents of the indictment and added comments, such as his belief that the bootprint evidence would establish Buckley's guilt and his belief that Buckley was involved in a burglary ring. The district court, following *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir.1988), concluded that Fitzsimmons is not entitled to absolute immunity for these statements, because they took place out of court and because press conferences are not "quasi-judicial" activities.

Whether press conferences are "quasi" something else does not matter. Immunity depends on how announcements could cause injury and on other functional considerations, not on nomenclature. *Imbler* expressly rejected a submission that the scope of absolute prosecutorial immunity should depend on the extent to which prosecutorial activity is "quasi-judicial". 424 U.S. at 420–21, 96 S.Ct. at 990. We need to know how announcements injure, and where the constitutional wrong lies.

One possibility is that accusations of crime cause infamy. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), holding that the Constitution does not deal with libel or slander by a public official, means that Fitzsimmons' announcement, standing alone, is not actionable under § 1983. Some other injury is essential to create a constitutional wrong. Buckley maintains that the press conference created additional injury because a defendant with a blackened reputation will have trouble obtaining release on bail or a fair trial. The Nicarico murder was front page news throughout northern Illinois. So was the announcement of charges against Buckley, Cruz, and Hernandez; the press has followed the case avidly. By accusing Buckley of being a thief as well as a murderer, and by overstating the value of the bootprint evidence, the prosecutor improperly increased the chances of a conviction, Buckley's argument concludes.

This approach avoids the rock of *Paul* only by falling into the whirlpool of *Imbler*. For if the injury lies in an alteration of the probabilities at trial, the remedy lies in the criminal process rather than in damages litigation. Buckley was entitled to a decision on bail made on the record, as opposed to a decision made on the basis of prejudicial publicity. If the judge denied bail or set it too high, Buckley was entitled to appeal. Similarly, if the press conference poisoned some minds against him, Buckley was still entitled to a voir dire adequate to find unbiased jurors. If such a venire could not be found in DuPage County, Buckley was entitled to a change of venue—or to dismissal of the charges against him. See generally *Patton v. Yount*, 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6

L.Ed.2d 751 (1961). If the judges who conducted the bail hearing and the trial did their jobs properly, they eliminated any constitutionally impermissible effects of the press conference. If they could not do so, then Buckley was entitled to the best remedy of all: dismissal of the prosecution.

Stating the constitutional wrong as an increase in the probability of an unfair trial demonstrates that absolute immunity applies to the announcement of the indictment. Given *Paul*, there was no (constitutional) injury independent of the indictment and trial. Buckley suffered no constitutional injury unless the judges failed to protect him at trial. This demonstrates that the suit against Fitzsimmons is a disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial. Either way, it cannot be the basis of an award of damages.

Stepanian and *Marx* hold that prosecutors do not have immunity when announcing indictments. These cases ask whether a press conference is "quasi-judicial", an approach different from *Imbler*'s. Neither *Stepanian* nor *Marx* identifies any constitutional wrong independent of the conduct of the litigation. We therefore respectfully disagree with the eleventh circuit.*

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir.1979), reversed in part on other grounds, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), is the only other decision requiring comment. Parts of Judge Swygert's opinion in that case may be understood to say that absolute immunity is never available for pretrial statements. 600 F.2d at 632–33. But Judge Pell did not accept that conclusion, *id.* at 661–62 (dissenting opinion), and Chief Judge Fairchild accepted Judge Swygert's conclusions only "to an extent," *id.* at 648 (concurring in Judge Swygert's opinion "except as qualified by the following observations."). Chief Judge Fairchild observed, *id.* at 649, that *Paul v. Davis* prevents any recovery because of injury to reputation. Judge Swygert's opinion concludes that a prosecutor may be liable for "pretrial prejudice", 600 F.2d at 632, which was left undefined. It may be that he conceived of a species of pretrial detriment outside the ambit of *Paul v. Davis*; at all events none of the opinions in *Hampton* discussed whether immunity is available when the theory is that out-of-court statements led to adverse judicial decisions (denial of release on bail and failure to seat an impartial jury). As this is Buckley's theory, his way to avoid *Paul v. Davis*, we conclude that *Hampton* offers him no support. When pretrial publicity produces constitutional injury only to the extent it influences the course of bail hearings or trial, the prosecutor is absolutely immune from damages.

C

[12] Buckley charges Fitzsimmons and two of his assistants, King and Knight, with misconduct during the investigation and the presentation of the case to the grand jury. Judge Leinenweber dismissed all of these claims, concluding that absolute immunity covers the entire investigation of a case, meetings with witnesses, presentation to a grand jury, and formulation of a decision to prosecute.

In the main, these conclusions are unexceptionable. Presenting the case to the grand jury, for example, is part of the prosecution proper. The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury. *Gray v. Bell*, 712 F.2d 490, 502–05 (D.C.Cir.1983); *Lovelace v. Whitney*, 684 F.Supp. 1438, 1442–43 (N.D.Ill.1988), affirmed by unpublished order under the name *Loveloce v. Hall*, 886 F.2d 332 (7th Cir.1989).

[13] Conversations between the prosecutors and the bootprint experts similarly

* Because our decision creates a conflict among the circuits, it was circulated before release to all judges in regular active service. See Circuit Rule 40(f). Judges Cudahy and Ripple voted to hear the case in banc. Chief Judge Bauer and Judge Flaum did not participate in the consideration or decision of this case.

may not be the basis of liability. Obtaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from what happens in court. Obtaining evidence from voluntary suppliers does not violate any of a defendant's rights; only using that evidence could do so. For the reasons we have given, when the injury depends on the costs of the judicial process (including the risk of judicial error), the prosecutor has absolute immunity. Allowing an award of damages on the basis of witness preparation would evade not only the prosecutorial immunity of *Imbler* but also the testimonial immunity of *Briscoe*. These immunities do not give way just because the plaintiff directs his fire against activities preparing for immunized presentations in court. *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir.1978).

[14, 15] Buckley's allegation that assistant state's attorneys coercively interrogated *him* presents a different problem, however. Such interrogations may inflict injury before the judicial process begins, injury that would be no less if the grand jury declined to return an indictment. If a prosecutor participates in a raid that unconstitutionally invades a suspect's privacy, immunity is qualified rather than absolute. *Hampton v. Hanrahan*, 600 F.2d at 631–33; *Marrero v. Hinlicky*, 625 F.2d 499 (5th Cir.1980). For the same reason, if a prosecutor conducts a coercive interrogation, only qualified immunity is available. *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir.1986); *Rex v. Teeples*, 753 F.2d 840, 843–44 (10th Cir.1985). To the extent *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), holds that prosecutors are absolutely immune from liability on account of their participation in an unconstitutional interrogation, we respectfully disagree.

Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails. A prosecutor could not be mulcted for conducting an interrogation without *Miranda* warnings, because a suspect has no entitlement to the warnings themselves. *Miranda* warnings protect the right to counsel and have no independent stature. Interrogations without *Miranda* warnings thus do not violate a suspect's rights; the violation occurs only when the statements are used in criminal proceedings. *Bazier v. Palmigiano*, 425 U.S. 305, 316–18, 96 S.Ct. 1551, 1557–58, 47 L.Ed.2d 810 (1976); cf. *Oregon v. Elstad*, 470 U.S. 298, 305–07, 105 S.Ct. 1285, 1290–92, 84 L.Ed.2d 222 (1985); *Michigan v. Tucker*, 417 U.S. 433, 445–46, 94 S.Ct. 2357, 2364–65, 41 L.Ed.2d 182 (1974). There is likewise no violation in "compelling" a suspect to speak, where the compulsion does not involve practices forbidden on other grounds. The right not to be compelled to testify against oneself is an evidentiary privilege. As the use immunity cases show, the government may require a suspect to speak, so long as it does not use the results against him. *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Arguments based on *Miranda* and the self-incrimination clause concern the conduct of the trial and therefore may not be the basis of damages; coercive tactics that are independently wrongful may, however, lead to awards.

[16] It is too early to tell whether Buckley is relying on *Miranda* and the self-incrimination clause, or on the more general right not to be punished (through coercive tactics) in advance of trial. It was accordingly premature to dismiss this aspect of Buckley's complaint. He is entitled to produce evidence, if he has any, tending to show that the prosecutors used tactics adding up to pretrial punishment. Because the injury from such tactics does not depend on the filing of an indictment or the conduct of trial, the prosecutors have no more than qualified immunity.

IV

[17] Last comes the question whether the three expert witnesses have absolute immunity for their pretrial activities: evaluating the bootprint, writing reports, discussing the case with prosecutors, and preparing to testify. We agree with the district court that they do. *Briscoe* holds that the presentation of testimony may not be the basis of liability, even if the witness deliberately misleads the court. It would be a hollow immunity if the aggrieved party could turn around and say, in effect: "True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony." Substance is exactly what *Briscoe* puts off limits.

An expert could violate a suspect's rights independently of the litigation. The expert might, for example, break into the suspect's home to obtain samples for analysis. Absolute immunity would not apply to that theft, for the same reason it does not apply to prosecutorial infliction of punishment without trial. A non-testimonial expert could violate a suspect's rights by "cooking" a laboratory report in a way that misleads the testimonial experts. Experts, like the police, "cannot hide behind [the immunity of] the officials whom they have defrauded." *Jones v. Chicago*, 856 F.2d at 994. But nothing in the complaint suggests that the three expert defendants hid evidence, as opposed to misinterpreting it.

Discussions between the prosecutors and the experts violated none of Buckley's rights. Preparing to commit slander or perjury is not actionable. The testimony itself is covered by immunity. Buckley makes it clear that the testimony is the real gravamen of his complaint. Olsen, he submits, "wrongfully changed his initial opinion"; Robbins was an "utterly disreputable witness-for-hire". Maybe so, but cross examination rather than a suit for damages is the right way to establish these things. Junk science is a plague in contemporary litigation, but the peddlers of poorly supported theories do not expose themselves to liability by doing research out of court or appearing in more than one case.

White v. Frank, 855 F.2d 956 (2d Cir. 1988), holds that *Briscoe* does not apply to "complaining witnesses". Buckley contends that the three experts are in this category, because but for their opinions the State's Attorney would not have obtained an indictment. The parallel is not apt. None of the experts invented the report of a crime or brought the fable to the state's attention. Jeanine Nicarico is dead. Each expert was brought into the case by the prosecutors, who sought to evaluate the strength of the evidence against Buckley. We therefore need not decide whether to follow *White*.

To sum up: We decline to accept the appeal on the district court's certification under § 1292(b). DuPage County's appeal, No. 89–2900, is dismissed on the County's motion. Buckley's appeal, No. 89–2899, is dismissed to the extent it seeks relief against DuPage County and Fitzsimmons. We affirm the remainder of the decisions under review on appeal No. 89–2899, with the exception of the contention that the prosecutors engaged in coercive interrogation. The decision is vacated to the extent it dismissed this portion of the complaint, and the case is remanded for further proceedings concerning Fitzsimmons, King, and Knight, consistent with Part III.C of this opinion. On Fitzsimmons' appeal, No. 89–2441, the decision of the district court is reversed, and the case is remanded with directions to dismiss the complaint to the extent it seeks damages on account of the press conference at which Fitzsimmons announced the indictment.

FAIRCHILD, Senior Circuit Judge, dissenting in part and concurring in part:

For the most part, I concur. I, however, have a different view concerning the immunity of prosecutor Fitzsimmons for his alleged creation of prejudicial pretrial publicity. With great respect, I think that Part III, B of the opinion fails to examine the nature of the particular function Fitzsimmons was performing so as to determine whether it presented the public interest needs which justify absolute immunity.

The majority says, "If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests." This "demarcation" is applied to Mr. Fitzsimmons's press conference state-

ments which are alleged to militate against a fair trial.

The majority leans on the fact that as defendant, Buckley may have been able to protect himself by procedures afforded in the criminal case itself. With all respect, absolute immunity should be recognized only when the purpose of such immunity is served.

In *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court decided to afford the same absolute immunity under section 1983 that the prosecutor enjoys at common law. *Id.* at 427, 96 S.Ct. at 993. The considerations underlying such immunity include "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423, 96 S.Ct. at 991. The Court agreed that the prosecutor's activities under consideration "were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." The Court did not consider whether "like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* at 430–31, 96 S.Ct. at 995 (footnotes omitted).

In the Supreme Court's most recent absolute immunity case, *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988), the Court considered the scope of judicial immunity and decided that demoting or discharging a probation officer was not a function which entitles a judge to immunity. The Court explained its functional approach saying, "[W]e examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy...." *Id.* at 224, 108 S.Ct at 542. The Court did note that court procedures provide safeguards, *id.* at 227, 108 S.Ct. at 544, but it did not present the safeguards as a reason for conferring immunity.

Even in *Butz v. Economou*, 438 U.S. 478, 511–512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895 (1978), a case in which the Court extensively discussed judicial procedure as a safeguard, the Court examined the adequacy of the protections only after it determined that the administrative judges and prosecutors whose immunity was at stake were performing the functions that entitle judges and prosecutors in the judicial branch to absolute immunity.

It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.

Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply.

Whether Buckley has sufficiently pled or could prove that Fitzsimmons's statements at the press conference deprived him of constitutional rights seems to me to pertain to the merits, which have not yet been reached.

I would affirm the district court's denial of absolute immunity for Fitzsimmons with respect to his press conference statements.

…el Act, which was, acc… …s reading of the legisla… …le federal agents to tar… …where the " 'top men' of … …operation resided in on… …cted their illegal activities… …*rcher*, 486 F.2d at 679. Th… …as of the view that, in ligh… …urpose, the reach of th… …not to be stretched to th… …guage.' " *United States v.* … F.2d 1281, 1288 (7th Cir.… *Archer*, 486 F.2d at 680).[5] …he Travel Act, section 2312, …. Peters was convicted, and … such as 18 U.S.C. § 2314 …preted broadly. *See McEl-*… *tates*, 455 U.S. 642, 655, 656 … 1332, 1339, 1340 n. 21, 71 …82); *United States v. Tur-*… …7, 414 & n. 13, 77 S.Ct. 397, … L.Ed.2d 430 (1957) (discuss… …ns" in which Congress stat… …yer Act, of which 18 U.S.C. …2314 are part, and rejecting …uction of "stolen"). In re… … 2314, which governs trans… …olen goods in interstate com… …preme Court observed that … …ntemplated coming to the aid … in detecting and punishing …e offenses are complete un… …but who utilize the channels … …ommerce to make a success… …nd thus make the state's de… …nitive processes impotent.' " … U.S. at 654, 102 S.Ct. at 1339. …jected a construction of the …ould "hobbl[e] federal prose… …r effort to combat crime in … …nmerce."[6] *Id.* at 655, 102

…of that statute with the Second …w reading of the Travel Act. *Id.*

…oth section 2312 and section 2314, …ed that the phrase "in interstate …sed in those sections is defined … than merely crossing state lines. … U.S. at 654 n. 18, 102 S.Ct. at 1339 …ed *Barfield v. United States*, 229 … Cir.1956), a case under section … proposition that "any driving … ly within the state of origin, state

S.Ct. at 1339. In view of the Supreme Court's characterization of the purposes of these sections and its broad interpretation of the phrase "transport in interstate commerce," it is clear that the federal/state concerns of the *Archer* court are not at issue under the circumstances of the present case.

Conclusion

In short, especially when viewed in light of the broad purpose of section 2312, the circumstances of the present case, including Mr. Peters' willing participation in the jurisdictional event and the other purposes for the government's inducing Mr. Peters to drive across the state line into Indiana, do not justify dismissal under the principles relied upon by the Second Circuit in *Archer*.

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

Stephen BUCKLEY, Plaintiff-Appellee—Cross-Appellant,

v.

J. Michael FITZSIMMONS, et al., Defendants-Appellants—Cross-Appellees.

Nos. 89-2441, 89-2899 and 89-2900.

United States Court of Appeals, Seventh Circuit.

Submitted Nov. 15, 1991.

Decided Jan. 2, 1992.

Arrestee brought § 1983 action against state's attorney, county sheriff, and others, claiming malicious prosecution. The United States District Court for the Northern District of Illinois, Eastern Division, Harry D. Leinenweber, J., entered judgment in favor of officials based on absolute immunity, except as to action of state's attorney in announcing indictment in press conference and appeals were taken. The Court of Appeals, Easterbrook, Circuit Judge, 919 F.2d 1230, dismissed in part, affirmed in part, and vacated and remanded in part. On grant of certiorari, the United States Supreme Court, 112 S.Ct. 40, vacated and remanded. On remand, the Court of Appeals held that prosecutors were entitled to immunity for their efforts in preparing expert testimony and for conducting press conference.

Affirmed as modified.

Fairchild, Senior Circuit Judge, filed opinion dissenting in part.

1. District and Prosecuting Attorneys ⇐10
Torts ⇐16

Unless act of gathering and evaluating evidence independently violates someone's rights, as for example, by seizing persons or things in violation of Fourth Amendment, both witnesses and prosecutors are entitled to same immunity they possess when they present evidence in court. U.S.C.A. Const.Amend. 4.

2. District and Prosecuting Attorneys ⇐10

Prosecutor had immunity from liability for announcing indictment during press conference; press conference itself did not create injury but rather indictee protested trial court's refusal to dismiss prosecution on count of prejudicial publicity.

…of destination, or from and to, if done as a substantial step in the furtherance of the intended interstate journey is, we think, within the act." *McElroy*, 455 U.S. at 657 n. 21, 102 S.Ct. at 1340 n. 21. The government does not ask us to reach the issue of whether federal jurisdiction would have existed even if Mr. Peters had not made the drive to Indiana, but had merely driv…

…en the truck to the Illinois meeting place with Agent Poole, with the knowledge that Poole would then transport the truck to Indiana. We note that, if the transaction had gone as Mr. Peters intended, Mr. Peters' efforts to avoid detection presumably would have been furthered by the truck's removal from the vicinity of the theft.

Appendix B 12

G. Flint Taylor (argued), John L. Stainthorp, Peoples Law Office, Chicago, Ill., for plaintiff-appellee.

Charles E. Hervas, James G. Sotos (argued), James R. Schirott, Michael W. Condon, Phillip A. Luetkehans, Schirott & Hervas, Itasca, Ill., Steve A. Schwarm, Asst. Atty. Gen., Mary P. Wetting, Office of Atty. Gen., Judicial Center, Topeka, Kan., for defendants-appellants.

Before WOOD, JR., and EASTERBROOK, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

PER CURIAM.

The Supreme Court remanded this case to us for reconsideration in light of *Burns v. Reed*, — U.S. —, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991). — U.S. —, 112 S.Ct. 40, 116 L.Ed.2d 19 (1991). *Burns* potentially affects the availability of immunity on two subjects: Fitzsimmons' press conference announcing Buckley's indictment, and the prosecutors' and witnesses' preparations for trial. Buckley contends that we should reconsider our decisions concerning appellate jurisdiction, but his petition for certiorari did not present any jurisdictional question to the Supreme Court. As instructed, we limit our consideration to the effect of *Burns*.

Burns holds that prosecutors are not entitled to absolute immunity for advice to police concerning the propriety of hypnosis and probable cause to make an arrest. It also holds that prosecutors are absolutely immune from damages on account of injuries they inflict during the course of an *ex parte* probable cause hearing that led to the issuance of a search warrant. Our case is not directly governed by *Burns*. Indeed, our initial decision recognized that *Burns* was awaiting decision by the Supreme Court, and we observed that the subjects are distinct. 919 F.2d 1230, 1239, 1242 (7th Cir.1990). Still, the reasoning of a case may reach beyond its holding, and the Court has invited us to revisit the subject.

First we take up the preparation for trial. Law enforcement officials asked four persons to determine whether Buckley's shoe made the bootprint found on the Sicaricus' door. One said no; a second said maybe; a third said probably, and the fourth said yes. All but the one who said no testified against Buckley, who seeks damages from all three. He also seeks damages from the prosecutors for their "supervision of and participation in a year long pre-arrest and pre-indictment investigation". Our initial opinion held that both the witnesses and the prosecutors are entitled to absolute immunity for these activities, save to the extent they independently violated Buckley's rights. (We remanded for further proceedings on Buckley's claim that the prosecutors coerced him to give pretrial statements.) According to *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), and *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), both prosecutors and witnesses are entitled to absolute immunity for what happens in court. We remarked: "It would be a hollow immunity if the aggrieved party could turn around and say, in effect: 'True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony.'" 919 F.2d at 1245.

Nothing in *Burns* undermines that holding. It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to unprepared events at trial! Allowing evasion through litigation about preparation for trial would make no more sense than undermining judicial immunity by entertaining a suit against the law clerk who participated in the preparation of the opinion. See *Mitchell v. McBryde*, 944 F.2d 229 (5th Cir.1991); *Oliva v. Heller*, 839 F.2d 37 (2d Cir.1988). Immunities cover not only the core functions sought to be protected but also normal preparatory steps. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503–07, 95 S.Ct. 1813, 1821–23, 44 L.Ed.2d 324 (1975).

Although *Burns* distinguishes "prosecutorial" activities from "investigative" ones, it is word play to call prosecutors' endeavors in asking experts for assistance "investigative" in the way hypnotizing or arresting suspects is. Talking with (willing) experts in trial preparation, no different from putting evidence under a microscope in a laboratory. (Interrogating Buckley is a different matter, which is why we directed further proceedings on claims about the prosecutors' treatment of him.) Slapping the label "conspiracy" on the process, as Buckley does, adds nothing.

[1] *Imbler* said it straight: "[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution". 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33. *Burns* did not express a different view; instead it quoted this language with approval. 111 S.Ct. at 1941–42. What goes for prosecutors goes for witnesses too. We therefore reiterate the conclusion of our initial decision: unless the act of gathering and evaluating the evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment), both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court. See also *Millspaugh v. Wabash County Department of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir.1991), concluding that *Burns* "reinforces *Buckley's* approach."

Burns bears more strongly on Buckley's claim arising out of the press conference. Like the advice to the police in *Burns*, the press conference took place out of court and was not part of preparation for trial. The prosecutor acted as a public official informing residents about the activities of his office—and perhaps preparing for an election campaign—rather than as an advocate. It does not follow, however, that the press conference should be assimilated to advising police to arrest a suspect, the subject of *Burns*. An arrest causes injury whether or not a prosecution ensues. So too a press conference may cause injury no matter what happens later—but the injury in question is defamation, which under *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), is not a constitutional wrong. See also *Siegert v. Gilley*, — U.S. —, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). Fitzsimmons does not need immunity to defeat a claim of defamation, because Buckley has none. (Buckley contends that our original decision misapplies *Paul*. But this topic was not raised in the Supreme Court—the petition for certiorari does not cite *Paul*—and so is not encompassed within the remand.)

[2] According to Buckley, the press conference violated his rights because the publicity deprived him of a fair bail hearing and trial. Buckley protests, in other words, what happened *in court*—that the judge erred in refusing to dismiss the prosecution on account of prejudicial publicity, or at least to enlarge him pending trial. Because the sting (apart from the defamation) depends on judicial action, *Imbler* confers immunity. So we remarked in *Millspaugh*, 937 F.2d at 1175: "the dividing line between absolute and qualified immunity is whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity.... *Burns* held a lawyer absolutely immune from liability for acts while representing the state during a probable cause hearing but only qualifiedly immune for giving legal advice to the police; the principal distinction was that the advice (and the officers' acts in reliance on that advice) could cause injury without the mediation of a judge." Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge. The defamation aspect of Buckley's claim fails under *Paul* and *Siegert*, the remainder under *Imbler*.

Burns identifies three considerations governing the scope of prosecutorial immunity: the common law in 1871 (when Congress enacted 42 U.S.C. § 1983), the risk of vexatious litigation if immunity is unavailable, and the role of the judicial process in controlling the prosecutor if damages are unavailable. The first of these favors Buckley, for common law immunity did not extend to press conferences. This may be an artifact: if courts do not recognize particular conduct as actionable, they have no reason to discuss immunity. No court would have thought a prosecutor's announcement of an indictment actionable in the first place in the nineteenth century. Justice Scalia, concurring in *Burns*, maintained that immunity at common law is a necessary condition for immunity in an action under § 1983. 111 S.Ct. at 1945. This approach, if adopted, would sever the link between immunities in § 1983 actions and those in *Bivens* actions established by cases such as *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), and *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Liability directly under the Constitution is a modern development, and it is accordingly hard (maybe impossible) to find corresponding immunities. So, too, it is hard to find immunities corresponding to recent enlargements in substantive liability. Cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, — U.S. —, 111 S.Ct. 2773, 2783, 115 L.Ed.2d 321 (1991) (Scalia, J., concurring) (observing that although state law ordinarily supplies statutes of limitations, federal law properly may be matched to newly minted theories of liability). The majority did not stop with the common law in *Burns*.

The second and third considerations favor Fitzsimmons. Buckley wants to use the press conference as the fulcrum to attack the substance of the charges laid against him, even though their presentation in court cannot be the basis of damages. So although the concern about vexatious litigation is limited to "actions that are connected with the prosecutor's role in judicial proceedings", *Burns*, 111 S.Ct. at 1943, Buckley places that role (like the prosecution itself) in question. As for the third consideration: this was at the core of our original decision. We relied particularly on this language from *Butz*, 438 U.S. at 512, 98 S.Ct. at 2914: "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." 919 F.2d at 1241. *Burns* quoted the same language with approval, 111 S.Ct. at 1942, and called the judicial process "one of the most important checks", *id.* at 1944. As we have been at pains to establish, Buckley had the benefit of the judicial process. If the press conference created prejudicial publicity, the injury occurred because of judicial action. It is only because the judge denied Buckley's application for release before trial and refused to dismiss the indictment that he suffered the loss for which he seeks damages from Fitzsimmons.

Buckley spent three years in jail. He craves vindication and redress. Yet for all counsel's inventiveness, it is apparent that he challenges the prosecution itself. *Imbler* reflects a judgment that prosecutors should be free to press criminal charges without fear that prosecuting the wrong person, or the right person in the wrong way, will lead to financial ruin.† If, as Buckley insists, *Imbler* was wrongly decided, he should press that argument in the only forum that can entertain it.

Buckley presents claims against governmental bodies that do not possess immunity and against the prosecutors who interrogated him; the former we have not addressed, and the latter we have remanded for further proceedings. Buckley's memorandum filed in this court after remand asserts that one or more of the assistant state's attorneys actually arrested him. Had we perceived on the original appeal that Buckley was making such a claim, we would have included it among the subjects remanded to the district court. The rationale behind Part III.C of our opinion, 919 F.2d at 1243–44, applies equally to a claim of arrest without probable cause. See also *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); *Millspaugh*, 937 F.2d at 1176. We modify our judgment to direct the district court to explore the allegation that the persons who arrested him lacked probable cause. All other claims are barred by immunity, and we reenter our original judgment except to the extent we have described.

FAIRCHILD, Senior Circuit Judge, dissenting in part:

I adhere to my earlier dissent, concluding there was no absolute immunity for the prosecutor's press conference. *Buckley*, 919 F.2d at 1245.

Going on from there, the Supreme Court in *Burns* seems to draw a line between "conduct closely related to the judicial process," *Burns*, 111 S.Ct. at 1943, and conduct in the role of "administrator or investigative officer." *Id.* at 1942. As to the latter functions, the prosecutor has only the protection of qualified immunity. The *Burns* Court seems to imply that the increased availability of the defense of qualified immunity is a reason for not expanding, and, perhaps, construing narrowly the application of absolute immunity for prosecutors. *Id.* at 1944.

My brethren draw the line between investigation and "preparation," evidently deeming preparation for trial sufficiently close to the judicial process to entitle the prosecutor to absolute immunity. I agree that a prudent prosecutor will interview witnesses and test other evidence brought to him by investigators in advance of trial. He may well ask for further investigation of areas of a case. I can agree that such "preparation" should fall on the absolute immunity side of the line. Plaintiff claims, however, that Mr. Fitzsimmons played a very aggressive role in seeking favorable expert evidence linking the incriminating boot print to plaintiff, and in "supervision of and participation in a year long pre-arrest and pre-indictment investigation." I am unable to conclude as a matter of law that this alleged conduct falls on the side of the line to which the *Burns* Court ascribed absolute immunity.

† State and local governments can prevent this effect for themselves by indemnifying their officers, and many do so. Indemnification enables public officials to set their personal concerns aside, assures adequate compensation of those the state has injured, and induces the government to exercise better control over those who exercise public power. Yet not all governmental bodies indemnify their employees, and the same principles of immunity apply to all. If the promise of indemnity were to enlarge public officers' liability (and thus the cost of the indemnity), states would be inclined to jettison or curtail their programs. Thus we approach the subject, as the Supreme Court consistently does, on the assumption that the defendants must pay any awards personally.

UNITED STATES of America, Appellee,
v.
Barbara DAUGHERTY, Appellant.
No. 91-1691.
United States Court of Appeals, Eighth Circuit.
Submitted Sept. 12, 1991.
Decided Oct. 29, 1991.

Defendant was convicted of voter fraud in making false statements to grand jury, following trial in the United States District Court for the Eastern District of Missouri, Stephen Nathaniel Limbaugh, J., and she appealed. The Court of Appeals held that the evidence was sufficient.

Affirmed.

1. Elections ⇐329

Testimony of two women that defendant had taken them to courthouse so they could vote absentee and had paid them either $3 or $5 for their vote was sufficient to sustain conviction for voter fraud, despite apparent discrepancies and vagueness regarding ancillary details concerning events occurring almost four and one-half years before trial. Voting Rights Act of 1965, § 11(c), 42 U.S.C.A. § 1973i(c).

2. Criminal Law ⇐1159.4(2)

Assessment of witness credibility is the responsibility of the jury.

3. Criminal Law ⇐1159.4(1)

Court of Appeals is especially unwilling to overturn jury's verdict when it manifestly depends on credibility assessments.

MEMORANDUM CASES

Same case below, 924 F2d 1210.

No. 90-1936. Parker Solvents Company, Inc., Petitioner v Royal Insurance Companies of America, Formerly Royal Globe Insurance Co.

October 7, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of Salve Regina College v Russell, 499 US ——, 113 L Ed 2d 190, 111 S Ct 1217 (1991).

Same case below, 936 F2d 185.

No. 90-7574. Stephen Buckley, Petitioner v Michael Fitzsimmons, et al.

October 7, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of Burns v Reed, 500 US ——, 114 L Ed 2d 547, 111 S Ct 1934 (1991).

Same case below, 919 F2d 1230.

No. 90-8219. Hurley Richard, et al., Petitioners v Louis W. Sullivan, Secretary of Health and Human Services

October 7, 1991. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of Melkonyan v Sullivan, 501 US ——, 115 L Ed 2d 78, 111 S Ct 2157 (1991).

Same case below, 926 F2d 399.

No. 91-162. Joyce Inaba, et al., Petitioners v Rosemary Soong, et al.

October 7, 1991. On petition for writ of certiorari to the Supreme Court of Hawaii. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Hawaii for further consideration in light of Siegert v Gilley, 500 US

APPENDIX C 2,

Minute Order Form
(rev. 3/88)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	HARRY D. LEINENWEBER	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	88 C 1039	Date	JUNE 9, 1989
Case Title	STEPHEN BUCKLEY VS COUNTY OF DUPAGE, ET AL		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilming
JUN 12 1989
Filmed on JUN 13 1989

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry]

The motion of the State's Attorneys to dismiss Count I is granted as to defendants Ryan, Knight, Kilander and King and granted as to defendant ~~Fitzsimmons. Counts III, IV, V and VI as to Fitzsimmons, Ryan, Knight,~~ Kilander and King are dismissed. The motions of the expert witnesses to ~~dismiss all counts of the complaint directed against them are granted. The~~ motion to dismiss by the County of Dupage is denied insofar as the complaint ~~pleads a cause of action based upon the actions of the Sheriff of Dupage County,~~ and is granted insofar as the complaint pleads a cause of action based upon the ~~actions of the State's Attorneys of Dupage County.~~ ENTER MEMORANDUM OPINION AND ORDER

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due ——— ———.
(5) ☐ Answer brief to motion due ——— Reply to answer brief due ———.
(6) ☐ Hearing / ☐ Ruling on ——— set for ——— at ———.
(7) ☒ Status hearing ☐ held ☐ continued to ☒ set for ☐ reset for 17 July 89 at 8:00 a.m.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for ——— at ———.
(9) ☐ Trial ☐ set for ☐ reset for ——— at ———.
(10) ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to ——— at ———.
(11) ☐ This case is dismissed ☐ with ☐ without prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

	No notices required.			number of notices
	Notices mailed by judge's staff.			date docketed
	Notified counsel by telephone.		JUN 12 1989	docketing dpty. initials
X	Docketing to mail notices.			date mailed notices
	Mail AO 450 form.		JUN 12 1989	
	Copy to judge/magistrate.			
	courtroom deputy's initials	Date/time received in central Clerk's Office		mailing dpty. initials

Document # 52

Appendix D 32 18

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED

JUN 9 1989

H. Stuart Cunningham, Clerk
United States District Court

STEPHEN BUCKLEY, Plaintiff, v. COUNTY OF DUPAGE, RICHARD DORIA, WARREN WILKOSZ, THOMAS VOSBURGH, ROBERT SOUCEK, KENNETH LEPIC, DENNIS KURZAWA, JAMES BURANDT, DONALD SCHMITT, J. MICHAEL FITZSIMMONS, JAMES RYAN, ROBERT KILANDER, THOMAS KNIGHT, PATRICK KING, EDWARD GERMAN, ROBERT OLSEN, ESTATE OF LOUISE ROBBINS, JOHN DOE, PETER POE and OTHERS NOT PRESENTLY KNOWN, Defendants.	NO. 88 C 1939 JUDGE LEINENWEBER

MEMORANDUM OPINION AND ORDER

Plaintiff's six-count complaint is brought under the Civil Rights Act, 42 U.S.C. §1983, and includes various pendent state claims, arising from plaintiff's arrest and subsequent prosecution for the murder of eleven-year old Jeanine Nicarico ("Nicarico") on February 25, 1983. Plaintiff sues the County of DuPage, Sheriff Richard Doria ("Doria") and several of his deputies, State's Attorney James Ryan ("Ryan"), former State's Attorney J. Michael Fitzsimmons ("Fitzsimmons"), several Assistant State's Attorneys, and three expert witnesses who testified during plaintiff's prosecution. The claims include false arrest and imprisonment, malicious prosecution, defamation, and the denial of plaintiff's (1) right to a fair trial; (2) right to

DOCKETED

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counsel; and 3) right to silence. In addition, plaintiff alleges that each defendant conspired to violate his constitutional rights.

On August 19, 1988 an answer denying the allegations of illegal and unconstitutional conduct was filed on behalf of Doria and all Sheriff's deputies.

The defendant State's Attorneys as well as the state's so-called "expert witnesses" have moved to dismiss on the ground of absolute privilege. In the alternative they move to dismiss on the ground of qualified privilege. The County of DuPage has moved to dismiss the Monell policy claim against it on the basis that it cannot legally be responsible for the policies, practices and customs of either the County Sheriff or the State's Attorney.

FACTS[1/]

On February 25, 1983, eleven-year old Nicarico was abducted from her home in Naperville, Illinois, sexually abused and murdered. Her body was found a few days later along the Prairie Path in DuPage County. (¶19)

An intensive investigation into the murder was commenced by the DuPage County Sheriff's office and the DuPage County State's Attorney's office, under the direction and responsibility of defendant Sheriff Doria and defendant State's Attorney Fitzsimmons, respectively. (¶20)

1/ The facts are taken from the complaint and are referenced by paragraph ("¶__").

Ever since the abduction there has been extensive publicity about and interest in the Nicarico case which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon defendants to find someone to charge and prosecute for this heinous crime. (¶21)

In the early stages of the investigation a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time a mentally disturbed and totally incredible person, Alex Hernandez ("Hernandez"), allegedly told Sheriff's detectives that plaintiff Stephen Buckley ("Buckley") was present for a post-murder conversation in which the murder was discussed. (¶22)

On that basis Sheriff's detectives went to plaintiff's home and questioned plaintiff without a lawyer. He denied any knowledge of the crime and voluntarily produced his boots. At about the same time a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description, was supplied to defendants. The description and sketch were dissimilar to plaintiff. (¶23)

At the direction of defendant Sheriff Doria, John Gorayczyk ("Gorayczyk"), the sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of plaintiff's boots with the bootprint on the Nicarico door and concluded that they did not match. (¶24)

Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab and immediately communicated it, inter alia, to defendants Doria, Robert Soucek ("Soucek"), James Burandt ("Burandt") and Donald Schmitt ("Schmitt"). These conclusions became general knowledge among all of the Sheriff's police defendants and, either at the time or subsequent thereto, were made known to defendants Fitzsimmons, Thomas Knight ("Knight") and Patrick King ("King"). (¶25)

Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to defendant Edward German ("German") of the Illinois Department of Law Enforcement Crime Lab for examination. (¶26)

Defendant German examined the boots and at first concluded in handwritten notes that plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to defendant Burandt and the contents were shared with the Sheriff, the State's Attorney, and their defendant-subordinates. (¶27)

Defendant Knight and various other defendants, including Doria, Fitzsimmons and Burandt, apparently not satisfied with defendant German's conclusions, contacted anthropologist Louise

Robbins ("Robbins") and defendant Olsen of the Kansas Bureau of Identification Crime Lab in search of a positive boot identification. (¶28)

Defendant Olsen, after reviewing defendant German's notes and report, and without the benefit of the boot itself, concluded that plaintiff's boot and the Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification." (¶29)

Defendant Olsen reduced these findings to report which was sent, along with German's report and notes, to defendants Knight and German. Defendant Knight shared Olsen's conclusions with defendant Burandt and with various other defendants, including Fitzsimmons, King, Doria, Soucek and Warren Wilkosz ("Wilkosz"). (¶30)

Confronted with three different expert reports which failed to match plaintiff's boot with the footprint on the door, defendants, including Knight, Burandt and German, procured their "positive identification" from Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these defendants knew or should have known. (¶31)

Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects.

Specifically, Sheriff's detectives, including defendants Wilkosz and Dennis Kurzawa ("Kurzawa"), at the direction and under the supervision and sometimes in the presence and with the assistance of defendants Knight, King, Soucek and Kenneth Lepic ("Lepic"), repeatedly interrogated alleged suspects, including plaintiff Buckley and Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to defendants. (¶32)

As a result of these interrogations, at least one experienced Sheriff's detective who participated, concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence." (¶33)

He repeatedly communicated his conclusion and its basis to the defendants named herein, including defendants Doria, Knight, King, Soucek, Lepic and Wilkosz. (¶34)

Unable to solve the case, defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case. (¶35)

Defendants Knight, King, Doria, Soucek, Lepic and Wilkosz, with the knowledge and approval of defendant Fitzsimmons, used

the grand jury as an investigative tool, inter alia, by further interrogating, intimidating and badgering potential suspects, including plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong-armed interrogation techniques by defendant Knight, plaintiff Buckley continued to maintain his innocence before the grand jury and again demonstrated no knowlege of the crime. (¶36)

Defendants Knight, King, Wilkosz and Burandt, with the knowledge of defendants Fitzsimmons, Doria, Soucek and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence while intentionally withholding Gorayczyk's findings, as well as misrepresenting Olsen and German's conclusions. (¶37)

Moreover, they presented a large amount of obviously incredible, irrelevant, false and contradictory hearsay and double hearsay evidence designed to improperly prejudice the plaintiff and other suspects before the grand jury. (¶38)

Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the grand jury despite the fact that they were independently shown to be false and completely unreliable by further investigation. (¶39)

Those defendants, including defendants Thomas Vosburgh and Knight, also interrogated another suspect, Rolando Cruz ("Cruz"),

without counsel and gave him financial payments and a rent-free apartment in exchange for inculpatory testimony, which was also placed before the grand jury despite its obvious lack of credibility. (¶40)

Despite this unremitting abuse of the grand jury process, and after more than eight months of "evidence" and over one hundred witnesses presented to the grand jury, defendant Fitzsimmons publicly admitted on January 27, 1984 that there was insufficient evidence to indict or prosecute. This was four months after the bootprint evidence had been presented to the grand jury. (¶41)

On March 9, 1984, twelve days before the Republican primary election in which defendant Fitzsimmons was facing the challenge of defendant Ryan, defendants Fitzsimmons, Knight, King and Doria obtained grand jury indictments for murder, rape and burglary against plaintiff Buckley, Hernandez and Cruz. No new evidence of importance was presented after January 27th. (¶42)

The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to cover up their inability to solve the crime, to aid defendant Fitzsimmons in his political campaign, and to further coerce plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other. (¶43)

Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the

bootprint evidence, led to the conclusion that plaintiff and his co-indictees, along with some other unindicted suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of plaintiff and his co-indictees to the media which were prominently and repeatedly displayed on television and in the newspapers. (¶44)

These false and prejudicial statements inflamed the populace of DuPage County against plaintiff and his co-indictees. (¶45)

Defendants, at the direction of defendants Doria, Knight and Soucek, then arrested and imprisoned plaintiff Buckley and his co-indictees on three million dollars bond, and defendants Knight, King and various defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-defendants. (¶46)

Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-defendant Hernandez retracted his prior "admissions" while being interrogated by defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by defendants. (¶47)

These post-indictment interrogations further reinforced the conclusion that plaintiff and his co-indictees were not involved in the Nicarico murder and this fact was repeatedly reasserted to defendants, including Doria, Soucek, Knight and King, by the same Sheriff's detective who has previously done so. (¶48)

Defendants continued to ignore this detective's conclusions and after he pursued a lead concerning another Nicarico suspect he was removed from the Nicarico investigation and given unfavorable statements, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons. (¶49)

Defendants, including Knight, King, Doria, Soucek, Burandt and Lepic, secreted the Gorayczyk boot evidence from plaintiff and his defense lawyers, who only discovered this information by independent investigation on the eve of trial. (¶50)

In March of 1984 defendant Ryan defeated defendant Fitzsimmons in the Republican primary for DuPage County State's Attorney, and in November of 1984 Ryan won the general election. (¶51)

In December of 1984 defendant Ryan assumed the duties of DuPage County State's Attorney, appointed defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of plaintiff and his co-indictees. (¶52)

Defendants, including defendants Knight, Doria, Burandt, German, Olsen, Schmitt and Robbins, continued to construct and shape their boot "evidence," which was designed to falsely implicate plaintiff despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door and which otherwise established that he was not involved in the crime. (¶53)

In January of 1985 defendants Knight and King, with the approval and under the supervision of defendants Ryan and Robert Kilander ("Kilander"), proceeded to select a jury and jointly try plaintiff and his co-defendants in a highly prejudicial and inflamed atmosphere, occasioned at least in part by public statements made and/or prompted by defendants. (¶54)

At trial defendant prosecutors presented as the cornerstone of their case against plaintiff, manufactured boot "evidence" through defendants Robbins, German, Schmitt and Olsen, who presented false opinions which, in the case of Olsen and German, were significantly at variance from their original reports and notes. (¶55)

At trial defendant prosecutors also presented the false inculpatory statements of plaintiff's co-defendants which had been obtained by defendants' coercive interrogations, promises or rewards, and other financial inducements. (¶56)

Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured and unfairly prejudicial evidence, the jury, while convicting plaintiff's co-defendants, were hung as to plaintiff's guilt or innocence and the court declared a mistrial. (¶57)

Nonetheless, defendants, including Ryan, Kilander, Doria, Soucek, Knight and King, immediately decided to continue plaintiff's imprisonment and to re-try him. Defendant Knight publicly announced this decision directly after the verdicts were returned and it was widely reported in the media. (¶58)

Defendant Fitzsimmons made additional post-trial statements which were published in which he falsely claimed that plaintiff was guilty of raping and killing Nicarico, while defendant State's Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements and to manipulate the press coverage, inter alia, prompting the Nicarico family and friends to make inflammatory public statements that plaintiff was guilty of the crime. (¶59)

In June of 1985 Brian Dugan ("Dugan"), of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985 with the murder and rape of seven-year old Melissa Ackerman ("Ackerman") of LaSalle County. Defendants were immediately put on notice by the recently resigned Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder because of the similarities between the two crimes. (¶60)

Within a week Dugan admitted to his public defender that he had not only murdered and raped Ackerman but also that he murdered and raped Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder. (¶61)

In November of 1985 the details of Dugan's Nicarico confession, which included the fact that he acted alone and details which had not been publicly revealed and could only be known to the murderer, were conveyed to defendants Knight and Kilander,

and then to the other defendants, including Ryan, Doria, Soucek and Lepic. (¶62)

Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County defendants, including Ryan, Doria, Knight, Kilander, Soucek and Lepic, refused and instead again decided to continue plaintiff's arrest, imprisonment and re-prosecution. (¶63)

They persisted in this decision even after Dugan passed a December 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month. (¶64)

Furthermore, defendant Knight made false and misleading statements which were published in the media and which were designed to discredit Dugan's confession, to further prejudice plaintiff, and to justify his continued arrest, imprisonment and prosecution. (¶65)

In June of 1986 plaintiff's defense lawyers presented additional evidence--the conclusion of a highly respected FBI footprint expert that Buckley's shoe did not make the Nicarico bootprint--defendants but they nonetheless continued the arrest, imprisonment and prosecution of plaintiff and opposed the lowering of plaintiff's bond from three million dollars. (¶66)

In September of 1986 defendant Kilander interrogated a DuPage County prisoner who allegedly told him that plaintiff had made a highly inculpatory statement to him. (¶67)

On September 19, 1986, during jury selection for plaintiff's retrial, defendants Knight and Kilander informed the court of this purported statement and as a result plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter plaintiff's lawyers established that it was physically impossible for plaintiff to have made the statement, and further, the prisoner denied telling Kilander that plaintiff had made the statement. (¶68)

In January of 1987 defendants sought another continuance in plaintiff's retrial, claiming that their anthropologist "expert," Robbins, was seriously ill and although able to testify could not travel from her North Carolina home. (¶69)

Fearing that Robbins was terminally ill, plaintiff's defense lawyers sought a video-taped examination for her use at the trial but defendants opposed this request and it was denied. (¶70)

Robbins died a short time later, and in March of 1987 defendants dismissed plaintiff's prosecution and terminated his arrest and imprisonment, three years after plaintiff was arrested. (¶71)

Defendants, including defendants Ryan, Doria, Knight, Kilander, King, Soucek and Lepic, decided to use the pretext of Robbins' death to publicly explain the dismissal rather than to

admit that plaintiff was innocent of the Nicarico murder and that they had arrested, imprisoned and prosecuted the wrong men. (¶72)

This pretextual reason was asserted publicly by these defendants and widely reported by the media. (¶73)

Defendants to this day still refuse to admit that they arrested, imprisoned and prosecuted the wrong men, and in furtherance of this continued cover up have refused to dismiss the case against plaintiff's co-defendants, who were sentenced to death plus two hundred twenty-five years, and who they are now re-prosecuting after their convictions were reversed on appeal. (¶74)

Plaintiff has a continuing and unremitting fear that defendants will re-arrest, re-imprison and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit. (¶75)

DISCUSSION

I. The State's Attorneys' Motion

The complaint indicates that the murder of eleven year old Nicarico and the subsequent indictment of plaintiff occurred during the term of office of former State's Attorney Fitzsimmons. In March of 1984 Fitzsimmons was defeated in the Republican primary by the current State's Attorney Ryan, who succeeded him as State's Attorney when his term concluded in December of 1984. Kilander served as Ryan's first Assistant State's Attorney during his term and Assistant State's Attorneys Knight and King served

in the Fitzsi..ons administration as well as the Rya.. administration. The defendant State's Attorneys (collectively "State's Attorneys") are sued in both their official and individual capacities. Fitzsimmons, Knight and King all were allegedly involved in pre-indictment stages of the investigation and Ryan, Kilander, Knight and King were involved in the trial and post-trial stages.

The State's Attorneys are variously[2/] charged with: (1) conspiring with sheriff's deputies and certain expert witnesses to manufacture bootprint evidence designed to implicate plaintiff; (2) the conduct of coercive interrogation in order to obtain evidence against plaintiff; (3) convening of a special investigative grand jury for the same purpose; (4) bribery of two suspects with reward money and other financial considerations to make false and culpatory statements about plaintiff; (5) the obtaining of indictments from the special investigative grand jury in order to pressure certain defendants into making inculpatory testimony against plaintiff; (6) the generation of false and highly prejudicial publicity; (7) making post-trial inflammatory statements; (8) the manufacture of false and inculpatory statements post-trial; and (9) engagement of a cover up rather than admitting plaintiff was innocent of the murder. Plaintiff

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2/ Of the various charges that are set forth immediately following, it would appear that Fitzsimmons, Kilander, Knight and King are charged with numbers (1) through (6) and Ryan, Knight and King are charged with (7) through (9).

contends that these specific acts were done to prejudice and defame plaintiff, to cover up defendants' failure to solve the crime, to cover up the arrest, imprisonment and prosecution of the wrong man, and to further defendant Fitzsimmons' political career, and in so doing defendants allegedly violated plaintiff's rights to due process and fair trial by causing the jury to deadlock rather than to acquit which in turn caused him to be incarcerated for an additional two years.

The discussion of prosecutorial immunity must start of course with Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, which established that a prosecutor is absolutely immune from a suit for damages under 42 U.S.C. §1983 for alleged violation of constitutional rights committed in "initiating a prosecution and in presenting the state's case." The court distinguished those functions "imminently associated with the judicial phase of the criminal process" from those which were more closely associated with investigative "police work" or administrative duties, the latter being subject to only qualified immunity. The court recognized that prosecutors were advocates for the state and therefore should not have to defend prosecutorial mistakes. The immunity was held not to depend upon the defendant's status as a prosecutor but upon the "functional nature of the activities of which a plaintiff complains." Id., 430, 96 S.Ct. at 994. Improper motivation such as malice, vindictiveness or self interest are irrelevant in assessing immunity, as are allegations of abusive, illegal or unethical conduct. Id.

Because Imbler involved post-indictment activities the question of whether the evidence-analyzing and case preparation functions performed by a prosecutor before the actual filing of an information or indictment or before a grand jury constituted prosecutorial or investigative functions was left open. Imbler, 424 U.S. at 431 n.33, 96 S.Ct. at 995 n.33. Circuit courts have, subsequent to Imbler, declined to establish a bright line commencement of proceedings test and have applied absolute immunity to many acts of prosecutors that have occurred prior to indictment. See e.g., Barbera v. Smith, 836 F.2d 96, 100 (2nd Cir. 1987); Powers v. Coe, 728 F.2d 97, 104 (2nd Cir. 1983). The Second Circuit has divided pre-litigation functions into at least two categories: first, the supervision of and interaction with law enforcement agencies in acquiring evidence which might be used in a prosecution, and second, the organization, evaluation and marshaling of this evidence into a form that will enable the prosecutor to decide whether to seek a warrant, indictment, or go to trial. The former was believed to be of a police nature and the latter prosecutorial. Barbera v. Smith, 836 F.2d at 100.

Other acts held to be encompassed within the protected prosecutorial function which occurred prior to indictment include instituting the termination of parental rights even if allegedly without notice, Martin v. Aubuchon, 623 F.2d 1282, 1285 (8th Cir. 1980); procuring a warrant for the arrest of a charged defendant, Lerwill v. Joslin, 712 F.2d 435, 438 (10th Cir. 1983), and in

advocating a particular level of bail, id. at 438, 439; activities in the plea bargaining context despite misrepresentation, Taylor v. Kavanaugh, 640 F.2d 450, 453 (2nd Cir. 1981); intimidating plaintiff in dismissing a damage suit in exchange for dismissing of criminal charges, McGruder v. Necaise, 733 F.2d 1146, 1148 (5th Cir. 1984); providing advice to law enforcement officials concerning the existence of probable cause and the legality of arrests, Myers v. Morris, 810 F.2d 1437, 1446 (8th Cir. 1987).

Pre-indictment interrogation of witnesses or securing of evidence by other means, when performed by a prosecutor, has been recognized in a variety of circumstances as being inherent in the decision whether to initiate a prosecution or as pre-trial preparation and thus qualify for absolute immunity. Myers at p.1449; Forsyth v. Kleindienst, 599 F.2d 1203 (3rd Cir. 1979), cert. denied, 453 U.S. 913, 101 S.Ct. 3147 (1981); Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984), cert. denied, 469 U.S. 1127, 105 S.Ct. 810 (1985) (conferring with potential witnesses for the purpose of deciding whether to file a charge); Lee v. Willins, 617 F.2d 320, 322 (2nd Cir. 1980), cert. denied, 449 U.S. 861, 101 S.Ct. 165 (1980) (coercion of false testimony leading to indictment, the reasoning being that the same injurious result from the decision to prosecute must flow from the initiation of criminal proceedings); Atkins v. Lanning, 556 F.2d 485 (10th Cir. 1977) (investigative case preparation can be

regarded as an integral component of case presentation); Demery v. Kupperman, 735 F.2d at 1144 ("conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case" and therefore immune); Cook v. Houston Post, 616 F.2d 791, 793 (5th Cir. 1980) (interviewing witnesses before presenting their testimony to a grand jury).

On the other hand, it has been held that when a prosecutor participates in ferreting out crime and is called upon to make the decisions similar to those that a policeman makes, he is functioning in an analogous role to that of a policeman. Accordingly, he is entitled to only the qualified immunity which the Supreme Court has determined to be sufficient to preserve the ability of police officers to function effectively. See Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213 (1966). Thus when a prosecutor participates in a search and seizure mission he has been held to be entitled to only qualified immunity. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979); see also Marrero v. Hialeah, 625 F.2d 499 (5th Cir. 1980). Failure of an investigative prosecutor to provide witness protection to a cooperating individual in the course of a fraud investigation only entitled the prosecutor to qualified immunity when the government had not yet engaged in the process of prosecuting a criminal defendant. The record revealed that complained-of acts occurred a full five months before an arrest warrant was issued and six months before

an indictment was returned. Barbara v. Smith, supra. Participation in an illegal search and seizure only entitled a prosecutor to qualified immunity. McSurely v. McClellan, 697 F.2d at 319-20. Sending a defamatory letter to the legislature after all criminal proceedings had terminated was considered administrative and only entitled to qualified immunity Walker v. Cahalan, 542 F.2d at 684-85.

We now turn to an analysis of plaintiff's allegations against the State's Attorneys within this legal framework.

A. Bootprint Evidence

According to the complaint, in the early stages of the investigation a bootprint was discovered on the door of the Nicarico home which the sheriff's detectives concluded was left by the killer. At approximately the same time the police were informed by one Hernandez that plaintiff was present for a post-murder conversation in which the murder was discussed. Plaintiff voluntarily produced his boots for a comparison examination by the DuPage County Crime Lab which concluded that they did not match the bootprint. This conclusion was communicated to defendants Fitzsimmons, Knight and King. The Sheriff then sent the boots to the Illinois Department of Law Enforcement Crime Lab for examination where it was concluded that plaintiff's boot could have made the footprint. This report was shared with the State's Attorney. Knight and Fitzsimmons and various other defendants contacted defendant Olsen of the Kansas Bureau of Identification Crime Lab

and anthropologist Robbins to conduct additional testing. Olsen concluded that although the boot and bootprint had similar class characteristics they were insufficient to allow a positive identification. Defendant Robbins however was able to make a "positive identification." Robbins, according to the complaint, was reviewed in the forensic community with great skepticism which the defendants "knew or should have known."

It appears therefore from this recitation of allegations that at the time of these activities complained of plaintiff had been connected to the crime scene by Hernandez independently of the boot evidence so that the purpose of the development of the boot evidence was to corroborate the information supplied by Hernandez, who is described in the complaint as being "a mentally disturbed and totally incredible person."[3/]

The question is whether under these circumstances the efforts by the State's Attorneys to obtain definitive boot evidence linking plaintiff to the Nicarico murder was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process. Barbara, 836 F.2d at 100. Since the bootprint and the boots were obtained prior to involvement by the State's Attorneys, it appears that their work was more in the nature of evaluative rather than acquisitive work. At the particular point they got

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3/ If it was "obvious" there would be all the more reason to seek corroboration.

involved plaintiff had already been fingered by Hernandez. The bootprint and plaintiff's boots had already been obtained by the Sheriff. The securing of expert testimony is not securing evidence but securing opinions as to the value and relevance of existing evidence to see if it could be admissible and evidence in a subsequent proceeding before a grand jury or at trial. Thus the work was more associated with the evaluative judicial phase rather than the acquisitive investigative phase. Id. Accordingly, the court finds that the State's Attorneys are entitled to absolute immunity for their involvement with the boot evidence.

B. Special Investigative Grand Jury

The complaint charges that the State's Attorneys convened a special DuPage County "investigative" grand jury solely for the purposes of the Nicarico case. It is charged that it was used as an investigative tool whereby witnesses, including plaintiff, were interrogated, intimidated, and badgered and where only the favorable portions of the boot evidence were admitted, with the unfavorable portion intentionally withheld. Other incredible, irrelevant, false and contradictory hearsay, and double hearsay, evidence designed to prejudice plaintiff was placed before the grand jury. The State's Attorneys also offered reward money to bribe Hernandez to make further false inculpatory statements to be presented to the grand jury. Indictments were subsequently obtained of plaintiff as well as others, the purpose of which was alleged to be in furtherance of the re-election prospects of

State's Attorney Fitzsimmons, who was being challenged by defendant Ryan.

The case law, with one exception cited by plaintiff (Briggs v. Goodwin, 569 F.2d 10 (D.C.Cir. 1977), cert. denied, 437 U.S. 904, 98 S.Ct. 3089 (1978)), regards as well settled that presentation of evidence to a grand jury falls within the scope of advocatory prosecutorial conduct protected by absolute immunity. As stated in Gray v. Bell, 712 F.2d 490 (D.C.Cir. 1983):

> "Participation in grand jury proceedings is a vital and customary part of a prosecutor's duties. At least in those instances where an indictment is returned, it can safely be said that such if not all of a prosecutor's conduct in presenting the evidence to a grand jury will reflect traditional advocacy directed to securing an indictment."

Briggs v. Goodwin, a 1977 decision of the same circuit as Gray, is the only case that distinguishes between so-called "investigative" grand juries and "indicting" grand juries. Briggs was a Section 1983 claim based upon allegations that a special prosecutor conducting a grand jury investigation of an anti-war organization knowingly gave false testimony during a hearing on a related motion in district court. The prosecutor had been directed by the court to disclose any government agents or informers among the witnesses subpoenaed before the grand jury. The Briggs court held that the prosecutor's actions were more investigative than prosecutorial. The court attached great importance to the fact that the grand jury had been convened to determine whether a crime had been committed, if so, its precise nature, and the identity of individuals to whom criminal

liability might attach. Briggs is therefore as distinguishable here as it was in Gray, where precise crimes had already been identified and certain individuals had been identified as targets.[4/] The court finds that the grand jury here was substantially dissimilar to the grand jury in Briggs so that whatever precedential value Briggs may currently have is irrelevant. Gray, 712 F.2d at 503. Therefore absolute immunity attaches to all allegations of prosecutorial misconduct related to the grand jury proceedings.

C. Post-Indictment, Pre-Trial and Trial Activities

The complaint charges that the State's Attorneys, after the indictment was handed down and prior to trial, constructed and shaped the boot evidence and secreted exculpatory boot evidence from plaintiff's defense lawyer until the eve of trial. The complaint further charges the State's Attorneys with presenting the manufactured boot evidence as the cornerstone of their case against plaintiff as well as the presentation of false and inculpatory statements of plaintiff's co-defendants obtained from coercive interrogations, promises, or rewards and other financial inducements.

It is clear that these allegations of prosecutory misconduct are absolutely privileged under Imbler v. Pachtman, 424 U.S. 493,

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4/ The same circuit that decided Briggs, in its later decision in Gray, noted that its previous decision in Briggs had been met with generally unfavorable comment. Gray, 712 F.2d 503 n.38.

96 S.Ct. 984 (1975). Imbler involved precisely the same types of allegations.

D. Post-Trial Activities

The complaint alleges that plaintiff's original criminal trial ended in a hung jury. The State's Attorneys then proceeded to announce that they planned to continue plaintiff's imprisonment[5/] and to retry him. They persisted in this decision to continue his arrest, imprisonment and re-prosecution in spite of the fact that subsequent to the mistrial another individual confessed to the crime and claimed to have acted alone. The prosecution and imprisonment was continued until March of 1987 when all of the charges against plaintiff were dismissed allegedly as the result of the death of Robbins, the prosecution's expert witness who tied the boot evidence to plaintiff.

It is clear that these activities were incurred as a result of the State's Attorneys' decision to retry the plaintiff. The original indictment still stood and the case continued against plaintiff in spite of the mistrial and could only be terminated by order of court. The decision as to when to prosecute is preeminently that of the State's Attorneys and is "at the heart of the holding in Imbler", Grant v. Hollenbach, 870 F.2d 1135, 1138 (6th Cir. 1989). Accordingly, the State's Attorneys are entitled to absolute immunity for these post-trial activities.

5/ Through an extremely high bond.

E. Public Statements by the Prosecutors

The complaint alleges that both pre- and post-trial false and misleading statements were made by the State's Attorneys which were designed to prejudice plaintiff and to justify his continued arrest, imprisonment and prosecution. These statements included claims that plaintiff was guilty of raping and killing Nicarico.

Plaintiff argues that Hampton v. Hanrahan and Powers v. Coe make it clear that public statements by prosecutors are not protected by absolute immunity because they are administrative rather than prosecutorial. Therefore plaintiff claims defendants' publicity campaign which repeatedly and falsely asserted plaintiff's guilt, falsely linked him to a burglary ring, and publicly attempted to discredit the confession of the man who confessed to committing the crime, is not protected by prosecutorial immunity.

While it is true that only qualified immunity is available to shield a prosecutor's public statements in a Section 1983 suit, the conduct to be actionable must amount to a deprivation of a constitutional right. Powers v. Coe, 728 F.2d at 105. Violations of state law alone are insufficient to state a claim for Section 1983 relief. Injuries to reputation and emotional distress caused by prosecutorial public statements are violations of state law and do not implicate the constitution. Geter v. Fortenberry, 849 F.2d 1550, 1557 (5th Cir. 1988); Coen v. Runner, 854 F.2d 374, 378-79 (10th Cir. 1988).

However plaintiff also charges that these public statements furthered "his false arrest, imprisonment and prosecution." While false arrest and imprisonment which implicate the Fourth Amendment qualify as a basis for a Section 1983 suit, the prosecutors' public statements must be a proximate cause to be actionable. If the State's Attorneys cannot be sued for advice leading to an arrest (Myers v. Morris, supra) or indictment (Lee v. Willins, supra) or pre-trial detention (Lerwello v. Joslin, supra), his public statements justifying these actions could hardly be the basis for arrest, imprisonment or prosecution. If the State's Attorneys are immune for their actions leading to arrest, imprisonment and prosecution even though their motive was improper, their statements and justifications for taking these actions, though perhaps evidence of motive, cannot themselves be actionable because motives are irrelevant in this inquiry. (Inman, 424 U.S. at 995 n.34, 96 S. Ct. at 995 n.34)[6/]

Thus, the only federal right legitimately implicated stems from plaintiff's claim that some of these statements had the design and effect of unfairly prejudicing him before the jury. It cannot be said at the pleading stage that the alleged pretrial publicity could not have influenced some of the jurors so as to cause the jury to hang rather than to acquit outright.

6/ A public statement could cause another person to take an action based on that statement but it is difficult to see how a person's own statement could induce him to act.

However only one public statement allegedly made predated the jury trial, viz, State's Attorney Fitzsimmons' public announcement of the indictments and his summary of the evidence.[7/] While defendants' argument as to why absolute immunity ought attach to such public statements is strong, the federal appellate cases deny absolute immunity to federal prosecutors for statements made at press conferences where a criminal indictments are announced. Steepanian v. Addis, 699 F.2d 1046, 1048 (11th Cir. 1983); Marrero v. City of Hialeah, 625 F.2d 499, 505-06 (5th Cir. 1980). Accordingly, all State's Attorneys are entitled to absolute immunity for their public statements except for Fitzsimmons who is not entitled to immunity for his announcement of the indictment.

F. Alleged Cover Up

Plaintiff contends that prosecutors are not immune from liability for actions taken to cover up their inability to solve the crime and the prosecution of the wrong person. Plaintiff cites three cases in support: Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983); Bell v. City of Milwaukee, 514 F.Supp. 1363 (E.D.Wisc. 1981); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979).

In Ryland prosecutors falsified a death certificate; in Bell a district attorney participated in a coroner's inquest in an effort to cover up a murder committed by a policeman; and in

7/ See Plaintiff's Response brief, p.11 note**.

Hampton the prosecutor sought to cover up his part in an illegal raid of an apartment. A common thread in these cases is that the deeds covered up will not themselves be entitled to absolute immunity because they all were committed while the prosecutor was acting outside prosecutorial function. The central point of Imbler is that the inquiry turns on this functional nature of the activity rather than the motive of the actor. Imbler, 424 U.S. at 419 n.13. Motivation is only relevant to the good faith defense of qualified immunity. Here the deeds allegedly covered up were themselves entitled to absolute immunity. Accordingly, it would make no sense to grant immunity to the acts themselves but to deny it to the cover up. Jones v. Shanklin, 800 F.2d 77, 80 (6th Cir. 1986). To hold otherwise would allow an artful pleader to circumvent Inman because every time a prosecutor denied improper motive for an immune activity he could be sued for covering up. Accordingly, the State's Attorneys are entitled to absolute immunity for these claims.

G. Plaintiff's Common Law Claim

Plaintiff also pleads pendent state common law causes of action for false imprisonment, malicious prosecution and intentional infliction of emotional distress. The prosecutors claim that they are entitled to absolute immunity for these claims arising out of the same set of operative facts upon which plaintiff bases his Section 1983 claim. The basis of the Supreme Court decision in Imbler is that prosecutors enjoy the same

absolute immunity for liability under Section 1983 for prosecutorial misconduct as they did under common law as it existed at the time Section 1983 was enacted. Imbler, 424 U.S. at 423, 96 S.Ct. at 992, and the cases and material cited at n.21. The common law immunity is well settled. Accordingly, the State's Attorneys are immune from liability for the pendent state law claims under Counts III, IV, V and VI.

CONCLUSION

The motion of the State's Attorneys to dismiss Count I (Section 1983) is granted as to defendants Ryan, Knight, Kilander and King, and granted as to defendant Fitzsimmons, with the exception of the claim under Count I based upon the claim of denial of constitutional right to a fair trial as a result of the pre-trial public announcements of defendant Fitzsimmons as described in paragraph 44 of the complaint. Counts III, IV, V and VI, as to Fitzsimmons, Ryan, Knight, Kilander and King are dismissed.

II. Motions to Dismiss Filed by
German, Olsen and the
Estate of Robbins ("expert witnesses")

The expert witnesses are sued by plaintiff under 42 U.S.C. §1983 and for various pendent state common law causes of action arising from plaintiff's arrest, indictment, and subsequent prosecution for the Nicarico murder. The expert witnesses each testified before the grand jury and at plaintiff's trial.

Plaintiff claims that they each gave perjured testimony regarding the so-called boot evidence. Plaintiff's complaint also alleges in paragraph 80 that..."each defendant reached an understanding, engaged in a sequence of events or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of plaintiff Buckley with the mutual purpose, objective and/or knowledge that it would deprive him of said right."

The expert witnesses haved moved to dismiss contending that they are entitled to absolute immunity on all of these claims because the claims are based on their testimony before the grand jury and at trial, for which they are entitled to absolute immunity under Briscoe v. LaHue, 460 U.S. 325, 103 S.Ct. 1108. In Briscoe the Supreme Court held that Section 1983 did not abbrogate the absolute immunity existing at common law with respect to either private witnesses or witnesses testifying under color of law. Accordingly, the court held that a plaintiff who suffered constitutional injuries as a result of perjured testimony offered at trial could not recover against the perjuror under Section 1983. In doing so the court analogized the reason for granting witnesses immunity with the reasons for granting immunity to prosecutors. 460 U.S. 343, 103 S.Ct. at 1119. Although left an open question in Briscoe, the Seventh Circuit has extended witness immunity to those testifying before a grand jury. Kincaid v. Eberle, 712 F.2d 1023 (1983). Common law and

Section 1983 immunity however only extends to the witness's testimonial function. The out of court conduct and investigative activities of a potential witness, even though the person later gives testimony in a judicial proceeding, is entitled only to qualified immunity. Otherwise, a police officer or other witness who violates the constitutional rights of another could immunize themself from these violations solely by appearing in court as a witness. Jones v. City of Chicago, 856 F.2d 985, 991, 993 (7th Cir. 1988). In Jones a laboratory technician employed by the City of Chicago conducted tests and typed semen and blood reports but failed to include the information in her laboratory report that she prepared for the criminal proceeding. The court held that the jury was entitled to conclude that the lab technician deliberately withheld the information so that it could not be used in the defense of the plaintiff.

To the contrary here the three defendants examined evidence and prepared reports which were later changed, allegedly falsely, to implicate plaintiff. There are no allegations that the initial investigative work done by any of the experts was false; rather plaintiff alleges that the initial reports were accurate but that the later testimony of the witnesses was changed in order to substantiate a case against plaintiff. Therefore the net effect of these allegations is not that defendants initially falsified their investigations but that they falsified their testimony before the grand jury and at trial. This distinguishes

this case from Jones: there the initial investigative acts were part of the conspiracy to railroad the plaintiff, Jones. Jones, 856 F.2d at 993. Here the testimonial acts of the witnesses were designed to railroad Buckley. This is a crucial distinction which entitles the expert witnesses to immunity.

Plaintiff also argues that a conspiracy including the expert witnesses existed among the defendants to violate the constitutional rights of plaintiff. To be liable as a conspirator a person must be a voluntary participant in a common venture for an illegal purpose. He must understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do his part to further them. Jones, 856 F.2d at 992. However in order to support a conspiratorial theory a plaintiff would have to allege non-privileged actions that would tie the expert witnesses into the conspiracy. Martin v. Malhoyt, 830 F.2d 237 (D.C.Cir. 1987). Here the complaint charges that the expert witnesses in their non-testimonial roles gave exculpatory information to the prosecution. This is certainly inconsistent with plaintiff's conspiratorial theory that these witnesses agreed to help inculpate the plaintiff. The misconduct complained of was the perjured testimony intended to inculpate plaintiff but these were entitled to immunity. Accordingly, the conspiratorial actions of the expert witnesses consisted of testimonial acts which are absolutely privileged either in suits directly against the witness or indirectly against the witness

through a conspiracy theory. Martin v. Malhoyt, 830 F.2d 237, 258 n.57 (D.C.Cir. 1987) citing Cooper v. O'Connor, 99 F.2d 135, 142 (D.C.Cir. 1938), cert. denied, 305 U.S. 643, 59 S.Ct. 146 (1938).

A contrary holding would open the door to artful pleading of conspiracy in order to circumvent testimonial immunity. There appears to be no substantial justification to treat an agreement to perform an act to which absolute immunity attaches differently from the treatment of the individual act itself. "Accusing the defendants jointly or by way of a count of conspiracy gives plaintiff's case no more virtue than if he had proceeded against each defendant singlely." Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, 1429, citing Cooper v. O'Connor, F.2d 135, 142 (D.C.Cir. 1938).

Plaintiff's final argument seeks to distinguish a witness who is responsible for the initiation of the criminal proceeding, i.e., a complaining witness from a mere testimonial witness, citing White v. Frank, 855 F.2d 956 (2nd Cir. 1988). While this argument (and White) seems to ignore the Briscoe v. LeHue principal that "immunity rests on functional categories [rather than] on the status of the defendant" (460 U.S. at 342), it is difficult to see here how any of the expert witnesses could be characterized as "complaining witnesses." In the prosecution of plaintiff all that the expert witnesses did was to evaluate certain evidence which was presented against plaintiff before the

grand jury. The White court made this distinction because at common law in an action for malicious prosecution the person who initiated a baseless prosecution was not absolutely immune. White, 855 F.2d at 959, quoting Malley v. Briggs, 475 U.S. 335, 340, 106 S.Ct. 1092, 1096 (1986). A complaining witness however is described as "the party who made the complaint." White, 855 F.2d at 959, quoting Hastings v. Lusk, 22 Wuend 410, 417 (N.Y. 1839). Here there is no allegation that any of the expert witnesses had anything to do with the initial arrest or the complaint filed against plaintiff; rather the allegations charge the expert witnesses with giving false testimony that led to his indictment and a hung jury. Thus their testimony is privileged under Briscoe and Kincaid. Accordingly, the motions of the expert witnesses to dismiss all counts of the complaint directed against them are granted.

III. Motion of the County of DuPage to Dismiss

Plaintiff's Monell policy claim against the County of DuPage is based on the actions of the Sheriff of DuPage County and the State's Attorney of DuPage County as county policymakers. Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

A. Sheriff of DuPage County

The County of DuPage argues that the Supreme Court in Pembaur did not decide that the sheriff and the county prosecutor are final policymakers of the county per se, but, in deference to the interpretation and application of Ohio state law by the Sixth

Circuit Court of Appeals, the elected officials were final policymakers as far as Hamilton County, Ohio was concerned. The Sixth Circuit considered relevant to its analysis that under Ohio law the sheriff is elected by the residents of the county; he serves as the chief law enforcement officer of the county; he submits his budget requests to the county board which in turn furnishes his office, books, furniture and other materials; his salary and all training expenses are paid out of the county general fund; and he is responsible for the neglect of duty or conduct of his deputies. It concluded that the sheriff's duties enumerated in the Ohio statutes clearly indicated that the sheriff could establish county policy in certain areas. Pembaur v. City of Cincinnati, 746 F.2d 337, 341 (6th Cir. 1984).

Employing a similar analysis of Illinois law shows that the sheriff is similarly treated. In Illinois the sheriff is described in the Constitution as a "county officer" and is located in the Local Government Article. S.H.A. Const. Art.7, §4. He is elected by the voters of the county. Id., §4(a). His duties, powers and functions are provided by law and by county ordinance, as well as the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance. Id., §4(d). His salary and operating expenses are set by a county appropriation ordinance and are paid from the county treasury. Ill.Rev.Stat., ch.125, §14e. The sheriff may appoint deputies not to exceed the number allowed by the county

board, Ill.Rev.Stat., ch.125, §7. The sherirf is liable for any neglect or admission of the duties performed by his deputies, Ill.Rev.Stat., ch.125, §13. All expenditures of the sheriff's office including the purchase of equipment are subject to the county appropriation ordinance. The sheriff must maintain an office in the county seat, the hours of which may be fixed and determined by the county board, Ill.Rev.Stat., ch.125, §15. The sheriff shall be the conservator of the peace in his county, Ill.Rev.Stat., ch.125, §17.

Comparing Illinois law and Ohio law shows that a sheriff in Illinois is as much a county officer as the Sheriff of Hamilton County, Ohio. He therefore is just as able to establish the official position of his County Board as the Sheriff of Hamilton County, Ohio was his. Therefore the court finds that the Sheriff of DuPage County is a final policymaker for DuPage County under Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). The cases cited by defendant, Thomas v. Talesky, 554 F.Supp. 1377, 1379 (N.D.Ill. 1983) and Baltz v. County of Will, 609 F.Supp. 992, 995 (N.D.Ill. 1985), were all decided before Pembaur and therefore inapplicable.

B. State's Attorney

State's Attorneys on the other hand are provided for in the Judicial article of the Illinois Constitution S.H.A. Const. Art. 6, §19.[8/] A State's Attorney's duties are provided in

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[8/] The Sixth Circuit did not make a statutory analysis for the office of prosecutor of Hamilton County as it did for the

Ill.Rev.Stat., ch.14., §1. Section 1 provides that the State's Attorney before entering upon the duties of his office "shall...be commissioned by the Governor." He also shall execute a bond to the People of the State of Illinois to be approved by the circuit court of his county and is to be filed with the Secretary of State and shall be to the benefit of the state, county, corporation or person injured by any breach. (Id.) Section 1.1 establishes the date of the commencement of his duties. Section 5 provides for the duties of the State's Attorney which include, inter alia, "to commence and prosecute all actions, suits, indictments and prosecution civil and criminal, in the circuit court for his county in which the people of the state or county may be concerned." Section 5(a) provides that the State's Attorney shall control the internal operations of his office and procure the necessary equipment, materials and services to perform the duties of his office. Furthermore, Illinois courts have held that the office of the State's Attorney is part of the Executive Branch of state government and its powers are executive powers. People v. Thompson, 43 Ill.Dec.600, 410 N.E.2d 600 (4th Dist. 1980); People v. Stinger, 317 N.E.2d 340, 342 (2nd Dist. 1974).

Footnote Continued
Sheriff of Hamilton County. According to the court there appeared to be no dispute that the prosecutor established county policy. Pembaur, 746 F.2d at 341 n.3.

It seems clear therefore that the office of State's Attorney is distinguishable from the office of Sheriff with the former being a state officer and the latter being a county officer. This is particularly clear where as here the State's Attorney is prosecuting an individual, in the name of the People, for allegedly violating the State Criminal Code. Jones v. City of Chicago, 639 F.Supp 146 (N.D.Ill. 1986); Stokes v. City of Chicago, 660 F.Supp. 1459 (N.D.Ill. 1987). The court therefore finds tht the State's Attorney is not a policymaker for his county. Accordingly, the motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

CONCLUSION

The complaint is dismissed against defendants Ryan, Knight, Kilander, King, German, Olsen and Robbins and denied as to defendants Fitzsimmons and the County of DuPage.

IT IS SO ORDERED.

HARRY D. LEINENWEBER, Judge
United States District Court

DATED: JUN 9 1989

Minute Order Form
(rev. 3/85e)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate	HARRY D. LEINENWEBER	Sitting Judge/Mag. If Other Than Assigned Judge/Mag.	
Case Number	88 C 1939	Date	Aug. 8 1989 @ 9:00 a.m.
Case Title	STEPHEN BUCKLEY VS. COUNTY OF DUPAGE, ET AL		

MOTION: [In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented]

Sent for Microfilming AUG 10 1989
Filmed on AUG 11 1989

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ☐ Judgment is entered as follows: (2) ☒ [Other docket entry:]

ENTER AGREED ORDER directing entry of final judgment pursuant to F.R.C.P. 54(b) as to entirety of order of June 9, 1989.

(3) ☐ Filed motion of [use listing in "MOTION" box above].
(4) ☐ Brief in support of motion due ____.
(5) ☐ Answer brief to motion due ____ Reply to answer brief due ____.
(6) ☐ Hearing / ☐ Ruling on ____ set for ____ at ____.
(7) ☐ Status hearing ☐ held ☐ continued to ☐ set for ☐ reset for ____ at ____.
(8) ☐ Pretrial conference ☐ held ☐ continued to ☐ set for ☐ reset for ____ at ____.
(9) ☐ Trial ☐ set for ☐ reset for ____ at ____.
(10) ☐ ☐ Bench trial ☐ Jury trial ☐ Hearing held and continued to ____ at ____.
(11) ☐ This case is dismissed ☐ without ☐ with prejudice and without costs ☐ by agreement ☐ pursuant to ☐ FRCP 4(j) (failure to serve) ☐ General Rule 21 (want of prosecution) ☐ FRCP 41(a)(1) ☐ FRCP 41(a)(2)
(12) ☒ (For further detail see ☐ order on the reverse of ☒ order attached to the original minute order form.)

☐ No notices required.
☐ Notices mailed by judge's staff.
☐ Notified counsel by telephone.
☒ Docketing to mail notices.
☐ Mail AO 450 form.
☐ Copy to judge/magistrate.

courtroom deputy's initials: MM

Date/time received in central Clerk's Office: 89 AUG -9 AM 11:03

number of notices: 2
date docketed: AUG 11 1989
docketing dpty. initials:
date mld. notices:
mailing dpty. initials:

Document # 58

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHEN BUCKLEY, Plaintiff,	)	No. 88 C 1939
v.	)	Judge Leinenweber
COUNTY OF DUPAGE, et al., Defendants.	)	

DOCKETED AUG 10 1989

AGREED ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO FED.R.CIV.P. 54(b)

This matter coming before the Court pursuant to the parties' joint motion for the entry of a final judgment on this Court's Memorandum Opinion and Order of June 9, 1989, granting in part and denying in part the Defendants' Motion to Dismiss. In granting said motion, this Court makes the following findings:

1. This civil rights case arose from the Plaintiff's arrest, prosecution and imprisonment for the murder of eleven year old Jeanine Nicarico in 1983. The case was brought against (1) the County of DuPage, (2) the current State's Attorney of DuPage County, James Ryan, his predecessor, Michael Fitzsimmons, and several current and former Assistant DuPage County State's Attorneys (State's Attorney Defendants); (3) DuPage County Sheriff Richard Doria and several Sheriff's Deputies (Sheriff's Department Defendants); and, (4) two expert witnesses and the Estate of a deceased expert witness (expert witness Defendants), all who testified during Plaintiff's prosecution.

2. All Sheriff's Department Defendants have answered the complaint and asserted an affirmative defense of qualified

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immunity.

3. The County, the State's Attorney Defendants and the expert witness Defendants filed Motions to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6). The State's Attorneys' Motion was premised primarily on grounds of absolute prosecutorial immunity. The expert witness' Motion was premised primarily on absolute witness immunity. The County of DuPage's Motion argued that it could not be held liable for acts perpetrated by members of either the DuPage County State's Attorney's Office or the DuPage County Sheriff's Department.

4. On June 9, 1989, this Court entered a Memorandum Opinion and Order denying in part and granting in part the Defendants' Motions:

(A) The Court granted the expert witness' Motion to Dismiss.

(B) The Motion to Dismiss the State's Attorneys was granted as to all State's Attorney Defendants, except for former DuPage County State's Attorney Michael Fitzsimmons. In this Court's opinion, absolute immunity is not available to Fitzsimmons on Plaintiff's claims that he was denied a fair trial because of prejudicial pretrial public statements made by Fitzsimmons in connection with the announcement of Plaintiff's indictment.

(C) The County of DuPage's Motion was granted as to its' contention that it should not be held liable under Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978), for actions of any members of the DuPage County State's Attorney's Office. However, the Motion was denied insofar as this Court determined that the County could be held liable under Monell for acts of members of the Sheriff's Department.

5. On July 10, 1989, Defendant Michael Fitzsimmons filed a Notice of Appeal to the Seventh Circuit Court of Appeals

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from this Court's determination that he was not entitled to absolute immunity for making prejudicial pretrial statements. That appeal was taken as a matter of right pursuant to Mitchell v. Forsyth, 472 U.S. 511 (1985).

6. This Court therefore finds, pursuant to Fed.R.Civ.P. 54(b), that its order of June 9, 1989, disposed of more than one but fewer than all of the claims and parties, and further expressly finds that there is no just reason for delay, particularly since a portion of this order is already being appealed as a matter of right by the Defendants.

7. Accordingly, this Court hereby directs the Clerk to enter final judgment pursuant to Fed.R.Civ.P. 54(b) as to the entirety of its order of June 9, 1989.

JUDGE LEINENWEBER

DATED August 8, 1989

APPROVED AS TO FORM & SUBSTANCE:

JAMES G. SOTOS, One of the Attorneys for the Defendants

G. FLINT TAYLOR, One of the Attorneys for the Plaintiff

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AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

NORTHERN DISTRICT OF ILLINOIS

Eastern Division

Stephen Buckley

JUDGMENT IN A CIVIL CASE

V.

County of DuPage et al

CASE NUMBER: 88 C 1939

DOCKETED
AUG 10 1989

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to Fed. R.Civ.P. 54(b) as to the entirety of this Court's order of June 9, 1989 stating on counts I, III, IV, V and VI of plaintiff's complaint are dismissed as to defendants Ryan, Knight, Kilander, King and Fitzsimmons on motion of defendants. Further, plaintiff's complaint is dismissed as to the expert witnesses on motions of the expert witnesses. The motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

August 9, 1989
Date

H. STUART CUNNINGHAM
Clerk

(By) Deputy Clerk

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RECEIVED
JUL 28 1989
R. STUART CUNNINGHAM
UNITED STATES DISTRICT COURT

GFT/jg-buckley

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHEN BUCKLEY	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 88 C 1939
	)	
	)	Judge Leinenweber
COUNTY OF DUPAGE, RICHARD DORIA, WARREN WILKOSZ, THOMAS VOSBURGH, ROBERT SOUCEK, KENNETH LEPIC, DENNIS KURZAWA, JAMES BURANDT, DONALD SCHMITT, J. MICHAEL FITZSIMMONS, JAMES RYAN, ROBERT KILANDER, THOMAS KNIGHT, PATRICK KING, EDWARD GERMAN, ROBERT OLSEN, ESTATE OF LOUISE ROBBINS, JOHN DOE, PETER POE AND OTHERS NOT PRESENTLY KNOWN,	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

JURISDICTION

1. The jurisdiction of the Court is invoked pursuant to the Civil Rights Act, 42 U.S.C. 1981, et seq.; the Judicial Code, 28 U.S.C. 1331 and 1343(3); the Constitution of the United States; and pendent jurisdiction.

PARTIES

1. Plaintiff STEPHEN BUCKLEY is a citizen of the United States and a resident of Aurora, Illinois.

Appendix E

2. Defendant COUNTY OF DuPAGE is a municipal corporation duly incorcoprated under the laws of the State of Illinois, and as such is responsible for the policies, practices, and customs of the DuPage County Sheriff's Department and States Attorney's Office, as well as for their employees, including the named Defendants herein.

3) Defendant RICHARD DORIA was, at all relevant times, the Sheriff of DuPage County and, as such, was, as a matter of law and fact, a final decisionmaker for DuPage County with regard to all the administative, investigative, arrest, and custodial acts and decisions alleged herein.

4) Defendant ROBERT SOUCEK was, at all relevlant times, Deputy Chief of the Criminal Bureau of the DuPage County Sheriff's Office.

5) Defendant Kenneth Lepic was, at all relevant times, a Lieutenant assigned to the Detective Division of the DuPage County Sheriff's Office.

6) Defendant JAMES BURANDT was, at all relevant times, a Sergeant assigned to the Detective Bureau of the DuPage County Sheriff's Office and was in charge of the evidence gathered in the Nicarico homicide investigation.

7) Defendants WARREN WILKOSZ, DENNIS KURZAWA, THOMAS VOSBURGH, JOHN DOE, and others not presently known were, at all relevant times, DuPage County Sheriff's police detectives and employees assigned to the Nicarico homicide investigation; additionally Defendant Wilkosz was assigned to work directly

with the Defendant prosecutors on the Nicarico grand jury investigation.

8) Defendant DONALD SCHMITT was, at all relevant times, a DuPage County Deputy Sheriff assigned as a Quartermaster.

9) Defendant ED GERMAN was, at all relevant times, an employee of the Illlinois Department of Law Enforcement, assigned to their Bureau of Scientific Services.

10) Defendant ROBERT OLSEN was, at all relevant times, an employee of the Kansas Bureau of Investigation, assigned to their Crime Laboratory.

11) Defendant LOUISE ROBBINS, an anthropologist and now deceased, was, at all relevant times, a resident of North Carolina. The Estate of Louise Robbins is administered by Margaret Bushnell, 1500 Cardiff Lane, High Point, North Carolina.

12) Defendant J. MICHAEL FITZSIMMONS was the duly elected DuPage County State's Attorney, from November, ~~1968~~ to November, 1984 and as such was, as a matter of law and fact, a final decisionmaker for Dupage County with regard to all the administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

13) Defendant JAMES RYAN has been, from November, 1984 to the present the duly elected DuPage County State's Attorney, and as such was and is, as a matter of law and fact, a final decision maker with regard to all administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

14) Defendant THOMAS KNIGHT was, until November of 1984, Assistant DuPage County States Attorney in charge of the Criminal Division and was assigned to the Nicarico investigation and prosecution; thereafter he was a duly appointed DuPage County Special Prosecutor appointed for the express purpose of investigating and prosecuting the Nicarico case.

15) Defendant ROBERT KILANDER has been, from December of 1984 to the present, the First Assistant States Attorney of DuPage County, and, after the Plaintiff's hung jury and resultant mistrial, was assigned to the Nicarico investigation and Plaintiff's re-prosecution.

16) Defendant PATRICK KING was, at all relevant times, an Assistant DuPage County States Attorney assigned to the Nicarico case investigation and prosecution.

17) Defendants PETER POE, and others yet unknown are assistant DuPage County States Attorneys.

18) At all relevant times, each of the above named Defendants were acting under color of law, or jointly and/or in conspiracy with those who were so acting, and are sued in their individual and official capacities.

FACTS

19) On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, Illinois, sexually abused, and murdered. Her body was found a few days later along the Prairie Path, in DuPage County.

20) An intensive investigation into the murder was commenced by the DuPage County Sheriff's Office and the DuPage County States Attorneys Office, under the direction and responsibility of Defendant Sheriff Doria and Defendant States Attorney Fitzsimmons, respectively.

21) Ever since the abduction, there has been extensive publicity about, and interest in, the Nicarico case, which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon the Defendants to find someone to charge and prosecute for this heinous crime.

22) In the early stages of the investigation, a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time, a mentally disturbed and totally incredible person, Alex Hernandez, allegedly told Sheriff's detectives that Plaintiff Stephen Buckley was present for a post murder conversation in which the murder was discussed.

23) On that basis, Sheriff's detectives went to Plaintiff's home and questioned Plaintiff without a lawyer. He denied any knowledge of the crime, and voluntarily produced his boots. At about the same time, a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description was supplied to the Defendants. The description

and sketch were dissimilar to Plaintiff.

24) At the direction of Defendant Sheriff Doria, John Gorayczyk, the Sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of the Plaintiff's boots with the bootprint on the Nicarico door, and concluded that they did not match.

25) Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab, and immediately communicated it to, inter alia, Defendants Doria, Soucek, Burandt and Schmitt. These conclusions became general knowledge among all of the Sheriffs' police Defendants, and, either at that time or subsequent thereto, were made known to Defendants Fitzsimmons, Knight and King.

26) Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to Defendant Edward German of the Illinois Department of Law Enforcement Crime Lab for examination.

27) Defendant German examined the boots and at first concluded in handwritten notes that Plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that the Plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to Defendant Burandt, and the contents were shared with the Sheriff, States

Attorney and their Defendant-subordinates.

28) Defendant Knight, and various others Defendants, including Doria, Fitzsimmons, and Burandt, apparently not satisfied with Defendant German's conclusions, contacted anthropologist Louise Robbins and Defendant Olsen of the Kansas Bureau of Indentification Crime Lab in search of a positive boot identification.

29) Defendant Olsen, after reviewing Defendant German's notes and report, and without the benefit of the boot itself, concluded that Plaintiff's boot and the Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification."

30) Defendant Olsen reduced these findings to a report, which was sent, along with German's report and notes, to Defendants Knight and German. Defendant Knight shared Olsen's conclusions with Defendant Burandt, and, with various other Defendants, including Fitzsimmons, King, Doria, Soucek, and Wilkosz.

31) Confronted with three different expert reports which failed to match Plaintiff's boot with the footprint on the door, the Defendants, including Knight, Burandt, and German, procured their "positive identification" from Louise Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these Defendants knew or should have known.

32) Defendants Knight and King were involved with the

Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including Defendants Wilkosz and Kurzawa, at the direction and under the supervision, and sometimes in the presence and with the assistance of Defendants Knight, King, Soucek and Lepic, repeatedly interrogated alleged suspects including Plaintiff Buckley and Alex Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, Plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to the Defendants.

33) As a result of these interrogations, at least one experienced Sheriff's detective who participated concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence."

34) He repeatedly communicated his conclusion, and its basis, to the Defendants named herein, including Defendants Doria, Knight, King, Soucek, Lepic, and Wilkosz.

35) Unable to solve the case, Defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case.

36) Defendants Knight, King, Doria, Soucek, Lepic and

Wilkosz, with the knowledge and approval of Defendant Fitzsimmons, used the grand jury as an investigative tool, inter alia, by further interrogating, intimidating, and badgering potential suspects, including the Plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong armed interrogation techniques by Defendant Knight, Plaintiff Buckley continued to maintain his innocence before the Grand Jury and again demonstrated no knowledge of the crime.

37) Defendants Knight, King, Wilkosz, and Burandt, with the knowledge of Defendants Fitzsimmons, Doria, Soucek, and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence, while intentionally withholding Gorayczyk's findings, as well as misrepresenting Olsen and German's conclusions.

38) Moreover, they presented a large amount of obviously incredible, irrevelant, false, and contradictory hearsay and double hearsay evidence designed to improperly prejudice the Plaintiff and other suspects before the jury.

39) The Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Alex Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the Grand Jury despite the fact that they were independently shown to be false and completely unreliable by further investigation.

40) Those Defendants, including Defendants Vosburgh and Knight, also interrogated another suspect, Rolando Cruz, without counsel, and gave him financial payments and a rent free apartment in exchange for inculpatory testimony which was also placed before the Grand Jury despite its obvious lack of credibility.

41) Despite this unremitting abuse of the grand jury process, and after more than 8 months of "evidence" and over 100 witnesses were presented to the Grand Jury, Defendant Fitzsimmons publicly admitted, on January 27, 1984, that there was insufficient evidence to indict or prosecute. This was four months after the bootprint evidence had been presented to the Grand Jury.

42) On March 9, 1984, twelve days before the Republican primary election in which Defendant Fitzsimmons was facing the challenge of Defendant Ryan, Defendants Fitzsimmons, Knight, King, and Doria obtained grand jury indictments for murder, rape, and burglary against Plaintiff Buckley, Alex Hernandez, and Rolando Cruz. No new evidence of importance was presented after January 27th.

43) The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to cover up their inability to solve the crime, to aid Defendant Fitzsimmons in his political campaign, and to further coerce the Plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other.

44) Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the bootprint evidence, led to the conclusion that the Plaintiff and his co-indictees, along with some other unindicted suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of the Plaintiff and his co-indictees to the media, which were prominently and repeatedly displayed on television and in the newspapers.

45) These false and prejudicial statements inflamed the populace of DuPage County against the Plaintiff and his co-indictees.

46) The Defendants, at the direction of Defendants Doria, Knight and Soucek then arrested and imprisoned Plaintiff Buckley and his co-indictees on 3 million dollars bond, and Defendants Knight, King, and various Defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-Defendants.

47) Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-Defendant Hernandez retracted his prior "admissions", while being interrogatored by Defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by the Defendants.

48) These post-indictment interrogations further

reinforced the conclusion that the Plaintiff and his co-indictees were not involved in the Nicarico murder, and this fact was repeatedly reasserted to the Defendants, including Doria, Soucek, Knight, and King, by the same sheriff's detective who had previously done so.

49) The Defendants continued to ignore this detective's conclusions, and after he pursued a lead concerning another Nicarico suspect, he was removed from the Nicarico investigation and given unfavorable assignments, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons.

50) The Defendants, including Knight, King, Doria, Soucek, Burandt, and Lepic, secreted the Gorayczyk boot evidence from the Plaintiff and his defense lawyers, who only discovered this information by independent investigation on the eve of trial.

51) In March of 1984 Defendant Ryan defeated Defendant Fitzsimmons in the Republican Primary for DuPage County States Attorney and in November of 1984 Ryan won the general election.

52) In December of 1984 Defendant Ryan assumed the duties of DuPage County States Attorney, appointed Defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of the Plaintiff and his co-indictees.

53) The Defendants, including Defendants Knight, Doria, Burandt, German, Olsen, Schmitt, and Robbins, continued to

construct and shape their boot "evidence" which was designed to falsely implicate the Plaintiff, despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door, and which otherwise established that he was not involved in the crime.

54) In January of 1985 Defendants Knight and King, with the approval and under the supervision of Defendants Ryan and Kilander, proceeded to select a jury and jointly try the Plaintiff and his co-Defendants in a highly prejudicial and inflamed atmosphere, occasioned, at least in part, by public statements made and/or prompted by the Defendants.

55) At trial the Defendant prosecutors presented as the cornerstone of their case against Plaintiff, manufactured boot "evidence" through Defendants Robbins, German, Schmitt and Olsen, who presented false opinions, which, in the case of Olsen and German, were significantly at variance from their original reports and notes.

56) At trial the Defendant prosecutors also presented the false inculpatory statements of Plaintiff's co-Defendants which had been obtained by the Defendants' coercive interrogations, promises of rewards, and other financial inducements.

57) Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured, and unfairly prejudicial evidence, the jury, while convicting Plaintiff's co-Defendants, were hung as to the Plaintff's

guilt or innocence, and the Court declared a mistrial.

58) Nonetheless the Defendants, including Ryan, Kilander, Doria, Soucek, Knight, and King, immediately decided to continue Plaintiff's imprisonment and to retry him. Defendant Knight publicly announced this decision directly after the verdicts were returned, and it was widely reported in the media.

59) Defendant Fitzsimmons made additional post trial statements which were published in which he falsely claimed that Plaintiff was guilty of raping and killing Jeanine Nicarico, while the Defendant States Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements, and to manipulate the press coverage by, inter alia, prompting the Nicarico family and friends to make inflammatory public statements that the Plaintiff was guilty of the crime.

60) In June of 1985 Brian Dugan of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985, with the murder and rape of 7 year old Melissa Ackerman of LaSalle County. The Defendants were immediately put on notice by the recently resigned Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder, because of the similiarities between the two crimes.

61) Within a week, Dugan admitted to his public defender that he had not only murdered and raped Melissa Ackerman, but

also that he murdered and raped Jeanine Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder.

62) In November of 1985, the details of Dugan's Nicarico confession, which included the fact that he acted alone, and details which had not been publicly revealed and could only be known to the murderer, were conveyed to Defendants Knight, Kilander, and then to the other Defendants, including Ryan, Doria, Soucek, and Lepic.

63) Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes, in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County Defendants, including Ryan, Doria, Knight, Kilander, Soucek and Lepic, refused, and instead again decided to continue Plaintiff's arrest, imprisonment, and re-prosecution.

64) They persisted in this decision even after Dugan passed a December, 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month.

65) Furthermore, Defendant Knight made false and misleading statements which were published in the media and which were designed to discredit Dugan's confession, to further prejudice the Plaintiff, and to justify his continued arrest, imprisonment and prosecution.

66) In June of 1986 Plaintiff's defense lawyers presented additional evidence --the conclusion of a highly respected F.B.I. footprint expert that Buckley's shoe did not make the Nicarico print -- to the Defendants, but they nonetheless continued the arrest, imprisonment and prosecution of the Plaintiff and opposed the lowering of Plaintiff's bond from $ 3 million.

67) In September of 1986, Defendant Kilander interrogated a DuPage County prisoner who allegedly told him that Plaintiff had made a highly inculpatory statement to him.

68) On September 19, 1986, during jury selection for Plaintiff's retrial, Defendants Knight and Kilander informed the Court of this purported statement, and as a result Plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter, Plaintiff's lawyers established that it was physically impossible for the Plaintiff to have made the statement, and further, the prisoner denied telling Kilander that Plaintiff had made the statement.

69) In January of 1987, the Defendants sought another continuance in Plaintiff's retrial, claiming that their anthropologist "expert", Louise Robbins, was seriously ill, and, although able to testify, could not travel from her North Carolina home.

70) Fearing that Robbins was terminally ill, Plaintiff's defense lawyers sought a video-taped examination of her for use at the retrial, but the Defendants opposed this request, and it

was denied.

71) Mrs. Robbins died a short time later, and in March 1987, the Defendants dismissed Plaintiff's prosecution and terminated his arrest and imprisonment, three years after Plaintiff was arrested.

72) The Defendants, ~~including~~ Defendants Ryan, Doris, Knight, Kilander, King, Soucek and Lepic decided to use the pretext of Mrs. Robbins' death to publicly explain the dismissal rather than to admit that the Plaintiff was innocent of the Nicarico murder and that they had arrested, imprisoned, and prosecuted the wrong men.

73) This pretextual reason was asserted publicly by these Defendants and widely reported by the media.

74) The Defendants, to this day, still refuse to admit that they arrested, imprisoned, and prosecuted the wrong men, and in furtherance of this continued cover up, have refused to dismiss the case against Plaintiff's Co-Defendants, who were sentenced to death plus 255 years and who they are now reprosecuting after their convictions were reversed on appeal.

75) Plaintiff has a continuing and unremitting fear that the Defendants will re-arrest, re-imprison, and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit.

COUNT I
(42 USC 1983 Claim)

76) Plaintiff realleges paragraphs 1-75

77) The acts and omissions of the Defendants, as alleged above, were done under color of law and without probable cause, thereby constituting false arrest and imprisonment, in violation of Plaintiff Buckley's fourth and fourteenth amendment rights and 42 USC 1983.

78) These acts and omissions also violated Plaintiff's right to a fair trial, were done to publicly prejudice and defame him, and were committed, inter alia, in order to cover up the Defendants' failure to solve the crime, to cover up their arrest, imprisonment and prosecution of the wrong men, and to further Defendant Fitzsimmons and Doria's political career, in violation of Plaintiff's 14th Amendment right to due process of law, and 42 USC 1983. These due process violations also directly caused the jury to be deadlocked, rather than to acquit Plaintiff, thereby directly causing his continued imprisonment for an additional two years.

79) These acts and omissions, including, inter alia, the abuse of the grand jury process and its power to indict, also violated Plaintiff's right to counsel and to remain silent, in violation of his fifth, sixth and fourteenth amendment rights, and 42 USC 1983.

80) Furthermore each Defendant reached an understanding, engaged in a sequence of events, or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of Plaintiff Buckley, with the mutual purpose, objective and/or knowledge that it would deprive him

of said rights.

81) Said conspirac(ies)/joint action(s) was/were effected under color of law and violated Plaintiff's fourth, fifth, sixth, and fourteenth amendment rights. The overt acts in furtherance of the conspirac(ies)/joint action(s) are set forth in paragraphs 19-75 above.

82) These acts and omissions directly and proximately injured Plaintiff Stephen Buckley by causing him pain, suffering, fear, mental anguish, humiliation, defamation, loss of work, loss of freedom, and out of pocket costs and expenses, which injuries continue to this day and will continue in the future.

Wherefore, Defendant Buckley demands judgment, jointly and severally, against each and every Defendnt named in this complaint except the County of DuPage, in the amount of $5 million dollars, plus punitive damages in the amount of $3 million dollars against each of those same Defendants, individually, plus costs, attorneys fees, and whatever additional relief this Court deems just and equitable.

COUNT II
(1983 Monell claim)

83) Plaintiff realleges paragraphs 1-82.

84) Defendant Doria, as Sheriff of DuPage County, and Defendants Fitzsimmons and Ryan, as the duly elected States Attorney of DuPage County, were, by operation of state law and as a matter of fact, the final decisionmakers with regard to

the investigative, prosecutorial, arrest, custodial, and administrative acts and decisions which they are above alleged to have made or participated in. Moreover, certain other acts and decisions made by Defendants Knight, Kilander, Soucek and Lepic were in areas where final decision making powers had been delegated to them by the Sheriff and/or States Attorney.

85) These acts, edicts, and decisions, directly and proximately caused the constitutional violations and injury to the Plaintiff, and are directly chargeable to the Defendant County of DuPage because of their status as final decisionmakers.

86) Additionally, or alternatively, the County of DuPage, through its Sheriff's Department and its States Attorneys Office, has de facto policies, practices, and customs, including one which provided that evidence exculpatory to the target of the grand jury or that otherwise negates probable cause is not presented to the Grand Jury.

87) Said de facto policies, practices, and customs were a direct and proximate cause of Plaintiff's injuries and Constitutional violations, thereby making them directly chargeable to the County of DuPage.

Wherefore Plaintiff Buckley demands judgment, in the amount of $5,000,000 against the County of DuPage, and against Defendants Doria, Fitzsimmons, Ryan, Soucek, Kilander and Lepic in their official capacity, and since the policy was implemented with malicious intent, $3,000,000 in punitive damages,

plus costs, attorneys fees, and whatever additional relief this Court finds equitable and just.

COUNT III

(Pendent state law claim for false arrest, imprisonment, malicious prosecution and defamation under Illinois and common law)

88) Plaintiffs reallege paragraphs 1-87.

89) Defendants named in paragraphs 1-18 above falsely arrested and imprisoned Plaintiff Stephen Buckley, without probable cause, and with malicious intent, and likewise initiated and continued a malicious prosecution, without probable cause, against him, which was ultimately determined in Plaintiff's favor, and published or caused to be published false and defamatory statements concerning the Plaintiff. These actions directly and proximately caused the injuries and damages to Plaintiff as claimed above, and are actionable under Illinois and common law.

WHEREFORE, Plaintiff Buckley prays for damages in the amount of $5,000,000 in actual and compensatory damages, jointly and severally, against each and every named Defendant except the County of DuPage and Defendant Buranit, plus punitive damages in the amount of $3,000,000 against each of these same Defendants, plus costs, attorneys fees and whatever additional relief this Court deems equitable and just.

COUNT IV
(Pendent Claim for Intentional Infliction of Emotional Distress under Illinois law)

90) Plaintiff realleges paragraphs 1-84.

91) The arrest, imprisonment, prosecution, and defamation of Plaintiff Stephen Buckley, as set forth above, were done recklessly, intentionally or with gross negligence, and directly and proximately inflicted emotional distress upon Plaintiff, in violation of Illinois and common law.

WHEREFORE, Plaintiff Stephen Buckley prays for damages in the amount of $5,000,000 in actual or compensatory damages for each of them, jointly and severally, against all named Defendants except Defendants DuPage County and Burandt, plus punitive damages in the amount of $3,000,000 for each of them against these same Defendants, plus attorneys fees.

COUNT V
(Conspiracy to falsely arrest, imprison and maliciously prosecute, intentionally inflict emotional distress and defame under Illinois law)

92) Plaintiff realleges paragraphs 1-91.

93) The conspirac(ies) as alleged in Count I above also constitutioned conspirac(ies)/joint action(s) to falsely arrest, imprison, maliciously prosecute, intentionally inflict emotional distress, and defame Plaintiff Stephen Buckley, under Illinois and common law, proximately causing injury and damages to him as alleged above.

COUNT VI
(Pendent respondeat superior claim under state law)

94) Plaintiff realleges paragraphs 1-93.

95) The individual Defendants named above, were, at all relevant times, employees and agents of the Defendant County of DuPage, were acting within the scope of their employment, and

their acts and omissions, as alleged in Counts III, IV and V, are therefore directly chargeable to the County under state law by respondeat superior.

Wherefore, Plaintiff Stephen Buckley prays for damages in the amount of $5,000,000 in actual and compensatory damages jointly and severally, plus punitive damages in the amount of $3,000,000 against the Defendant County of DuPage, plus costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

PLAINTIFF DEMANDS TRIAL BY JURY.

Respectfully submitted,

Dated: July 27, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STEPHEN BUCKLEY,

Petitioner,

v.

J. MICHAEL FITZSIMMONS, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

RULE 15(1) STATEMENT

Respondents submit this statement in accordance with Sup.Ct.R. 15(1) in order to clarify the scope of this Honorable Court's review over Petitioner's claim arising from prejudicial pretrial public statements. Specifically, Petitioner has argued that "[t]he prosecutors, including Fitzsimmons, Knight, and Ryan, orchestrated and participated in a publicity campaign which prejudiced him in the community, with the jury venire and with the trial judge, leading to a hung jury, rather than an acquittal, and the

continuation of an unreasonably high bail for two years thereafter" (*See* Petitioner's Petition for a Writ of *Certiorari* (hereinafter Petition, p. 23). In addition to former State's Attorney J. Michael Fitzsimmons' public statement in connection with the announcement of Petitioner's indictment, Petitioner now claims that certain other statements were uttered "while petitioner was either on trial or in custody awaiting trial" (*See* Petition, p. 23).

In his questions presented for review, however, Petitioner limits his petition for *certiorari* to only Fitzsimmons' public statement delivered in connection with the announcement of Petitioner's indictment (*See* Petitioner's Questions Presented for Review, No. 2). Accordingly, this Honorable Court should confine itself, as have the lower courts, to that same statement. *See Yee v. City of Escondido, Cal.*, 112 S.Ct. 1522, 1532-34 (1992) (only questions fairly included within those set forth in petition will be considered).

All other public statements challenged by Petitioner were uttered after Petitioner's bail was set and his trial completed,[1] and could not, therefore, have contributed to the denial of the federally protected rights for which Petitioner seeks redress. After the announcement of Petitioner's indictment, the next public statement occurred following the completion of Petitioner's trial and involved prosecutor Thomas Knight's declaration that Petitioner would be retried (*See* Appendix E to petition, p. 14, para. 58). Petitioner next alleged that Fitzsimmons and Knight made "additional post-trial statements" declaring that Petitioner was guilty (*See* Appendix E, p. 14, para. 59)

[1] Petitioner's bail was set at Three Million Dollars ($3,000,000.00) when he was indicted in March, 1984 (Petition, p. 6). The trial occurred in January, 1985 (Petition, p. 7).

(emphasis added). Petitioner also challenged prosecutor Knight's public statements which discredited Brian Dugan's confession (*See* Appendix E, p. 15, para. 65). Dugan did not confess until June of 1985, several months after Petitioner's trial had been completed (*See* Appendix E, p. 14, para. 60). Next, Petitioner alleged that prosecutor Robert Kilander deliberately caused a false and inculpatory statement to be published about Petitioner in September of 1985, again several months after Petitioner's trial (*See* Appendix E, p. 16, para 68). Finally, Petitioner claims the prosecutors made pretextual public statements explaining the dismissal of the charges in March of 1987 (*See* Appendix E, p. 17, para. 72).

Only Defendant Fitzsimmons' announcement of Petitioner's indictment could possibly have contributed to the setting of Petitioner's bail or to any unfairness in Petitioner's trial. Agreeing with that reasoning, Federal District Judge Harry D. Leinenweber dismissed Petitioner's claims arising from the prosecutors' public statements with the exception of the statement delivered by Fitzsimmons when announcing Petitioner's indictment (*See* Appendix D to Petition, pp. 27-29). Likewise, the Seventh Circuit has twice limited its review of the publicity issue to the single statement which was delivered by Defendant Fitzsimmons. *See Buckley v. Fitzsimmons*, 919 F.2d 1230, 1242-43 (7th Cir. 1990) (hereinafter *Buckley I*); *Buckley v. Fitzsimmons*, 952 F.2d 965, 966 (7th Cir. 1992) (hereinafter *Buckley II*). For the foregoing reasons, Respondents suggest this Court should do the same.

SUMMARY OF ARGUMENT

Though separated into three sections—two dealing with prosecutorial immunity and one with witness immunity—the Respondents' brief in opposition to Petitioner's petition for *certiorari* is essentially premised upon a single overriding theme. Specifically, the Seventh Circuit's focus on the nature of Petitioner's claim and the source of his injury in resolving the immunity issues is entirely consistent with this Honorable Court's decisions in *Burns v. Reed*, 111 S.Ct. 1934 (1991) and *Imbler v. Pachtman*, 424 U.S. 409 (1976).

Argument I deals with the prosecutors' interrogations of Petitioner and other suspects, and the alleged manipulation of the expert witnesses and boot print evidence. Closer scrutiny of the interrogation claim, however, reveals that Petitioner is actually challenging prosecutorial conduct which occurred in front of the grand jury and in the courtroom. Indeed, Petitioner has conceded that he was injured only through the introduction of the fruits of the interrogations at trial and to the grand jury. This concession reveals that Petitioner's targeting of the interrogation process is only a smoke-screen for his true claim which is based upon the introduction of tainted testimony at trial.

Similarly, the prosecutors' alleged manipulation of the expert witnesses and the boot print evidence caused no injury apart from the introduction of testimony to the grand jury and at trial. Again, Petitioner's true claim is premised on the use of tainted testimony.

Skipping over argument II for the moment, the third argument in this brief is similar to the first, except that the category of Defendants seeking immunity is expert

witnesses as opposed to prosecutors. Again, while Petitioner ostensibly targets out-of-court, non-testimonial acts committed by these witnesses, he only claims to have suffered a constitutional injury as a result of the false and misleading testimony and use of reports provided by these witnesses before the grand jury and at trial. Thus, Petitioner suffered injuries only through the witnesses' testimonial acts, which fall comfortably within the umbrella of witness immunity.

Argument II addresses Petitioner's claim that he was deprived of a fair trial by virtue of former DuPage County State's Attorney, J. Michael Fitzsimmons' inflammatory account of his indictment. Because this claim was redressable through a plethora of procedural safeguards inherent in the criminal justice process, argument II is similar to arguments I and III in that all involve an injury allegedly suffered by Petitioner solely as a result of his prosecution.

The claim against Fitzsimmons differs from the claims addressed in arguments I and III, however, because the prosecutorial conduct which allegedly caused the injury—a public statement—did not occur within the confines of the courtroom. Nonetheless, this Court has recognized that immunity must, in certain circumstances, extend to a prosecutor's acts beyond the courtroom when the policies supporting immunity so require.

Here, the rationale upon which *Imbler* was premised supports the extension of immunity to a prosecutor's announcement of an indictment which is alleged to have infringed on a criminal defendant's right to a fair trial. Specifically, the public announcement of an indictment carries with it a significant threat of retaliatory litigation. Nonetheless, such announcements are required of a prosecutor in order to ensure that the public is informed of the important activities of the prosecutor's office. Final-

ly, the full panoply of procedural safeguards available to ensure that the criminal defendant receives a fair trial minimizes the need for a damages remedy.

For all the above reasons, as more fully set forth throughout this brief and in the Seventh Circuit's decisions below, this Honorable Court should deny Petitioner's petition for a writ of *certiorari*.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE COURT OF APPEALS' APPLICATION OF ABSOLUTE IMMUNITY TO THE PROSECUTORS' INTERROGATIONS OF SUSPECTS AND TO THEIR EVALUATIONS OF THE BOOT PRINT EVIDENCE IS CONSISTENT WITH THIS HONORABLE COURT'S DECISION IN *BURNS v. REED*.

Petitioner claims that he is not seeking review of the Seventh Circuit's decision to apply absolute immunity to any of the prosecutors' actions which occurred during the grand jury phase of Petitioner's prosecution or during the criminal trial itself (Petition, pp. 18-22). Rather, Petitioner purportedly confines his petition to the prosecutors' "interrogation of suspects and acquiring [of] opinion evidence concerning the crucial boot print—acts that commenced directly after the crime was committed, months before a grand jury was convened, and a year before anyone was arrested or charged with an offense"[2] (Petition, p. 22).

[2] These acts were allegedly perpetrated by former DuPage County State's Attorney J. Michael Fitzsimmons, and former Assistant

(Footnote continued on following page)

Because the interrogations and the "manufacturing" of boot print evidence did not occur before judicial bodies, Petitioner argues that *Burns* defeats the prosecutors' claim to immunity.

A. Boot Print Evidence

Dealing first with the boot print evidence, the Seventh Circuit rejected Petitioner's position, concluding that Petitioner was essentially dressing up a challenge to the prosecutors' trial activity and trial preparation through reliance on the label "investigative activity." *Buckley II*, 952 F.2d at 966-67. Accepting Petitioner's allegations that the prosecutors contacted several experts, and coerced and manipulated their opinions in search of a positive identification, the Seventh Circuit noted that Petitioner's only injury stemming from these activities occurred when the experts had their reports and opinions presented to the grand and petit juries. *Id.* If immunity for a prosecutor's work before judicial bodies could be defeated by targeting his preparation for courtroom activity, then *Imbler* and its progeny would be effectively whittled to a mere pleading rule. Indeed, every prosecutor worth his salt meets with witnesses and discusses their testimony in advance of trial.

The Seventh Circuit's approach was fully consistent with this Court's decision in *Burns*. There, prosecutor Reed was denied immunity for giving bad legal advice to police which allegedly caused Kathy Burns to be falsely arrested,

[2] *continued*
State's Attorneys Thomas Knight and Patrick King. The allegations are not directed at current State's Attorney James Ryan and his First Assistant Robert Kilander, neither of whom served the County of DuPage in the State's Attorney's Office until well after Petitioner was indicted.

an injury which could not have been averted by a judge. In denying immunity, this Court reasoned that where the suspect is not eventually prosecuted, the judicial process is unavailable as an important check on the prosecutor's out-of-court activities. *Burns*, 111 S.Ct. at 1944.

Immunity was granted to prosecutor Reed, on the other hand, for all of his conduct at a probable cause hearing where he elicited testimony in support of a successful application for a search warrant. In applying immunity to that conduct, the Court relied in part on the availability of the judicial process as a check on prosecutorial misconduct. *Id.* at 1942. Consistent with that approach, the Seventh Circuit has explained the difference between the immunized and non-immunized conduct in *Burns* as follows: "the principle distinction was that the advice (and the officer's acts in reliance on that advice) could cause injury without the mediation of a judge." *Millspaugh v. County Dept. of Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991).

Petitioner contends that the similarities between *Burns* and *Buckley* are "remarkable," and focuses on the alleged investigative conduct involved in the two cases (Petition, p. 19). Petitioner further argues that the only distinction between *Burns* and *Buckley* lies in the fact that only Stephen Buckley was indicted by a grand jury (Petition, pp. 19-20). Petitioner dismisses this distinction as being "without moment" because the prosecutors in both cases are "alleged to have decided to make, and directed their respective arrests" (Petition, p. 20).

Petitioner places insufficient weight on the central role occupied by both the criminal trial process and by the grand jury in assessing the prosecutors' entitlement to immunity. In deciding to immunize prosecutors for courtroom activities, this Court has consciously encouraged prosecutors to

vigorously and zealously present the State's evidence free of the inhibitions posed by the spector of civil liability. The downside to this immunity, of course, is that overzealous prosecutors functioning without the risk of civil liability will manipulate and abuse the process to the detriment of criminal defendants who are constitutionally guaranteed a free trial. Where the prosecutor functions in the courtroom, however, this concern is minimized because of the plethora of procedural safeguards designed to ensure the fairness of the criminal trial process.

Nowhere is the sufficiency of these safeguards more evident than in connection with the instant case. With respect to the boot print evidence, Petitioner charges the prosecutors with coercing, manipulating and conspiring with the expert witnesses, thus causing an unjustified indictment and depriving Petitioner of a fair trial. This type of claim, however, is particularly well suited to redress in the criminal process. Each testifying expert was subject to full voir dire and cross examination concerning their qualifications, the substance of their opinions and the circumstances surrounding their retention. Moreover, Petitioner was entitled to present his own experts to refute the opinions of the State's experts.

These trial safeguards support the Seventh Circuit's rejection of Petitioner's efforts to analogize the *Buckley* prosecutors' consultations with expert witnesses to the *Burns* prosecutors' advice concerning hypnosis and probable cause. In *Burns*, the trial process was wholly unavailable as a check on the prosecutors' activity. Cathy Burns was hypnotized and then arrested solely pursuant to the collaborative efforts of police and prosecutors, thus giving rise to a false arrest claim which was complete prior to any possibility of judicial review. In this case, by contrast, Petitioner's injuries were allegedly caused by the

criminal justice system's failure to protect him from the abuses of prosecutors. To the extent Petitioner is seeking damages for false arrest akin to those sought by Cathy Burns, the Seventh Circuit has already confirmed that prosecutorial immunities are inapplicable. *Buckley II*, 952 F.2d at 968-69. *Burns* does not compel any broader avenue of relief.

Aside from *Burns*, the line of demarcation between in-court and out-of-court injuries also finds implicit support in *Imbler v. Pachtman*, 424 U.S. 409 (1976). In *Imbler*, this Court was persuaded by common law cases which immunized prosecutors from malicious prosecution claims because prosecutors would otherwise be deflected from vigorously discharging their duties by the fear of retaliatory lawsuits. *Id.* at 421-24. Such concerns about retaliatory behavior are not focused as much on a specific type of prosecutorial conduct as they are on the nature of the criminal defendant's injury—being subjected to unfounded and unfair prosecutions. Indeed, the Plaintiff's injury in *Imbler* was identical to that alleged by Stephen Buckley—wrongful imprisonment and denial of a fair trial in connection with a prosecution for murder. Those who suffer such injuries often will seek to retaliate against the prosecutor.

Similarly, the approaches to prosecutorial immunity taken by other circuit courts of appeal also support, both explicitly and implicitly, the methodology applied by the Seventh Circuit in *Buckley*. In *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980), the Second Circuit held that immunity applies even to investigative activities[3] where the plaintiff seeks to "recover for

[3] The prosecutor in *Lee* was accused of coercing perjured testimony by arresting and incarcerating two witnesses, threatening
(Footnote continued on following page)

an injury arising solely from the prosecution itself—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention." *Id.* at 322. Only in cases "where the alleged harm is inflicted independently of the prosecution" is absolute immunity inapplicable. *Id.*

The Second Circuit reaffirmed its approach in *Lee* more recently in *Barbera v. Smith*, 836 F.2d 96 (2nd Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989). Ironically, Petitioner relies on *Barbera* for the proposition that immunity does not extend to the acquiring of evidence (Petition, p. 22). *Barbera*, however, involved a prosecutor's failure to provide police protection to a woman who was murdered to prevent her from testifying in a criminal fraud prosecution. *Id.* at 98. The victim's injury—deprivation of life—was suffered independently of the criminal trial process. In the present case, by contrast, the injuries which Petitioner attributes to the expert witnesses occurred when he was prosecuted. The Seventh Circuit's analysis in *Buckley* is, therefore, consistent with *Barbera* and identical to *Lee*.

The absence of an injury attributable to a criminal prosecution also distinguishes the other cases on which Petitioner relies in seeking *certiorari*. In *Forsyth v. Kleindeinst*, 599 F.2d 1203 (3rd Cir. 1979), *cert. denied*, 453 U.S. 913 (1981), the plaintiffs alleged illegal searches and seizures when their conversations were intercepted by federal agents seeking evidence for use in the prosecution of others. Similarly, the plaintiff in *McSurely v. McClellan*,

[3] *continued*
to take away a witness' baby, inducing another witness to refrain from testifying by dropping felony charges against her, and supervising police officers who planted a pistol in Lee's possession. 617 F.2d at 321. These were all out-of-court acts which only caused injury through testimony given at trial.

697 F.2d 309, 312-14 (D.C. Cir. 1982), claimed that his political career was damaged by virtue of the unlawful seizure and dissemination of papers from his home. In *Gobel v. Maricopa County*, 867 F.2d 1201, 1205-06 (9th Cir. 1989), the plaintiffs alleged that inflammatory public statements damaged their reputations and caused them to be falsely arrested and subjected to several hours of dehumanizing jail conditions. Such claims appear to be precisely the types of situations contemplated by the Seventh Circuit as being outside the parameters of prosecutorial immunity. *See Buckley I*, 919 F.2d at 1244.

In summary, distinguishing between in-court and out-of-court injuries is an appropriate method of gauging a prosecutor's entitlement to absolute immunity. This Court's decisions in *Imbler* and *Burns*, as well as those of other circuit courts of appeals, lend credence to this approach. Because the prosecutors' alleged manipulation and coercion of the boot print experts caused Petitioner no injury apart from the presentation of evidence to the grand jury and at trial, the Seventh Circuit's decision to apply immunity to such acts should not be reviewed.

B. Interrogations

Turning to the interrogation issue, the Seventh Circuit has accepted Petitioner's contention that interrogations which occurred out of court are not immunized despite the fact that Petitioner was later prosecuted. *Buckley I*, 919 F.2d at 1244. However, the Court of Appeals also emphasized that the absence of immunity would not help Petitioner unless he could demonstrate an injury flowing directly from the interrogations. *Id.* For that reason, the Seventh Circuit initially remanded the interrogation issue to the district court with instructions that Petitioner be permitted an opportunity to demonstrate a constitutional

violation flowing from the interrogations themselves rather than from the use of in-court testimony shaped from the fruits of those interrogations. *Id.*

Since that time, however, Petitioner has expressly conceded that his "injury only arose when the fruits of the interrogation were used in the criminal process (i.e., statement was presented to the grand jury or at trial)" (*See Buckley v. Fitzsimmons, et al.* No. 90-7574, Petitioner's original Petition for Certiorari, p. 10 & n. 3). Accordingly, while Petitioner seeks to sidestep immunity by targeting interrogations which pre-dated the impaneling of the grand jury, his concession reveals that his true claim is still premised upon the prosecutor's alleged use of tainted testimony before the grand jury and at trial. As in the case of the boot print evidence, the presentation of such testimony is among the clearest examples of immunized conduct under *Imbler*. *See for example Burns*, 111 S.Ct. at 1939.

In the context of interrogations, *Burns* does not compel any broader avenue of liability than that already permitted under *Buckley I & II*. The legal advice given to the police by Prosecutor Reed caused Kathy Burns to suffer a constitutional injury which could not have been averted by a judge. In the instant case, by contrast, the trial process contained safeguards prohibiting the use of the fruits of any improper or unlawful prosecutorial interrogations.

The bottom line is that prosecutors, like police officers and other law enforcement officials, often interrogate individuals in a manner perceived by some as overzealous, improper and even unethical. This is not surprising given the polarized positions of the state and those it prosecutes. Such alleged misconduct, however, is redressable under the Civil Rights Act only if the plaintiff can show that the manner of interrogation deprived him of a federally

protected right. Where the plaintiff's injury stems from in-court testimony fashioned from the fruits of those interrogations, absolute immunity provides an impenetrable hurdle to a damages claim against a prosecutor.

II.

BURNS SUPPORTS THE COURT OF APPEALS' GRANT OF ABSOLUTE IMMUNITY TO FORMER DUPAGE COUNTY STATE'S ATTORNEY J. MICHAEL FITZSIMMONS FOR THE ANNOUNCEMENT OF PETITIONER'S INDICTMENT.

Petitioner has claimed that former DuPage County State's Attorney J. Michael Fitzsimmons' inflammatory summary of the evidence when announcing Petitioner's indictment prevented him from getting a fair criminal trial. Because the only injuries which Petitioner attributed to this statement arose directly from Petitioner's prosecution, the Seventh Circuit held *Burns* did not undercut Fitzsimmons' claim to immunity. *Buckley II*, 952 F.2d at 967-68.

As the Seventh Circuit conceded, however, Fitzsimmons' public statements presented a more difficult question than that posed by the interrogations and obtaining of expert opinions because the public statements neither occurred in court nor did they constitute trial preparation. *Buckley II*, 952 F.2d at 967. Though the interrogations and obtaining of expert opinions also did not themselves occur in the courtroom, the true claims there arose from the introduction of the fruits of those activities during the criminal trial itself. Fitzsimmons' extra-judicial statements are distinguishable in that they were never formally introduced into the trial, but are alleged only to have infected the process.

This distinction, however, should not undercut Fitzsimmons' claim to immunity. Though Fitzsimmons' statements

were not themselves introduced at trial, the criminal justice system nonetheless provides a plethora of safeguards to ward off external infections of the trial process. Specifically, jury voir dire, peremptory challenges, challenges for cause, motions to change venue, and ultimately, motions for dismissal, are all intended to prevent the trial process from being sabotaged by outside influences. In *Burns*, this Court repeatedly mentioned the availability of judicial checks on prosecutorial conduct as a determinative factor in assessing the scope of immunity. *Burns*, 111 S.Ct. at 1942 & 1944. To the extent Petitioner believes these safeguards did not work effectively in his trial, Petitioner's claim against Fitzsimmons is revealed as a "disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial." *Buckley I*, 919 F.2d at 1243.

An additional reason to insulate a prosecutor's announcement of a criminal indictment from civil challenges is grounded in the strong public policy encouraging public disclosure of the basis for criminal indictments. While it is true that the common law, rather than public policy, is more instructive on whether a particular claim should be immunized (*Burns*, 111 S.Ct. at 1943), this does not mean that policy reasons should be ignored.[4]

---

[4] To the extent the concurring justices in *Burns* deemed an identical common law immunity essential to § 1983 immunity, Respondents note that such a narrow construction of immunities fails to recognize the far broader spectrum of civil liability risks faced by modern, as opposed to common law era prosecutors. This expanded liability is perhaps the best explanation for the absence of corresponding immunities in a number of cases. *See Buckley II*, 952 F.2d at 968. Press conferences and the pervasive impact of mass media on the fairness of criminal trials were neither addressed nor contemplated by the common law.

Specifically, a prosecutor is duty-bound to announce criminal indictments and to inform the public about the important activities of the State's Attorney's Office. *See Ware v. Carey*, 75 Ill.App.3d 906, 394 N.E.2d 690, 695 (1979), *citing ABA Standards Relating to the Administration of Criminal Justice, Compilation*, p. 77 (1974). In light of their obligation to inform, prosecutors would be placed in a difficult quandary if they were immunized from liability stemming from the decision to indict, but not from the announcement of that indictment. Such an interpretation of *Imbler* would allow every criminal defendant who harbors ill-will against his indictor to "attack the substance of the charges laid against him" through a civil rights lawsuit claiming the denial of a fair trial attributable to adverse publicity. *See Buckley II*, 952 F.2d at 968.

The chilling effect of such a precedent warrants serious consideration. If faced with liability for the announcement of an indictment, prosecutors will be predictably reluctant to inform the public of the basis for indictments, particularly in cases of substantial public interest where the public demand for information is greatest. Reluctance would be greater in such cases because the media's more expansive coverage of the announcement would increase the likelihood of a civil rights claim linked to unfavorable publicity. Such reluctance would be inconsistent with the prosecutor's duty to keep the public informed of the important activities of the office and would further erode public confidence in law enforcement in general.

Indeed, the criminal trial process is by nature, public, as the full power of the state is exerted upon the accused. Such governmental action is not, in a democratic society, permissible without public scrutiny and accountability. Against that backdrop, insulating the announcement of criminal indictments from civil rights challenges is vital

to "protecting the free flow of information from the prosecutor" to the public and to "preservation of public awareness and the proper performance of a prosecutor's duties." *Strong v. Slaton*, 510 F.Supp. 161, 163-64 (N.D. Ga. 1981). *See also Sperl v. Duekmegian*, 482 F.Supp. 1026, 1028-29 (C.D. Cal. 1980), *aff'd*, 642 F.2d 1154 (1981); *Gutierrez v. Vergari*, 499 F.Supp. 1040, 1050-52 (S.D. N.Y. 1980).

Petitioner also argues in seeking *certiorari* that immunity in the context of public statements is inconsistent with the functional approach applied in cases such as *Forrester v. White*, 484 U.S. 219, 227 (1988) (Petition, pp. 26-27). However, a fuller examination of *Forrester* and other applicable precedent supports, rather than undercuts, the Seventh Circuit's focus on the nature of Petitioner's injury in assessing the scope of prosecutorial immunity. In *Forrester*, a judge was not entitled to immunity for terminating a probation officer on account of her sex. The probation officer's injury—deprivation of employment—was totally unrelated to any pending or contemplated criminal prosecution.

This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), also provides a useful illustration. There, the United State's Attorney General was not entitled to absolute immunity for authorizing illegal wiretaps seeking evidence for use in a criminal prosecution against persons other than the target of the wiretaps. *Id.* at 520-24. Once again, the target's injury—illegal search and seizure—was completed out of court without regard to the criminal justice process, which was never initiated against the plaintiff.

Assuming hypothetically that the plaintiffs in *Mitchell* had been prosecuted, and that they had sued the Attorney General for introducing intercepted conversations at trial, immunity would surely have applied. Under that hypothetical, any claim that the criminal justice process was

tainted through the use of illegally seized evidence would have been redressable during the prosecution. Accordingly, while the prosecutorial misconduct was identical in both instances—illegal wiretapping—immunity should apply only where the injury stemmed from the criminal judicial process.

The absence of an injury attributable to the judicial process also undermines Petitioner's efforts to identify a conflict between *Buckley* and the Eleventh Circuit's decisions in *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988). Though the Seventh Circuit actually identified such an inter-circuit conflict (*Buckley I*, 919 F.2d at 1243), the fact is that *Buckley* is easily reconcilable with both *Stepanian* and *Marx*. In *Stepanian*, the Eleventh Circuit addressed the scope of a prosecutor's immunity for public statements in a context completely removed from the criminal process. Indeed, *Stepanian* was not even a civil rights case, but rather, a common law defamation claim. 699 F.2d at 1047. Thus, the harm caused to Petitioner's reputation could not have been addressed either in his criminal trial or, parenthetically, in a civil rights case. *See Paul v. Davis*, 424 U.S. 693 (1976). For that reason, the *Stepanian* court was never presented with a factor deemed central in *Imbler*, *Burns* and in *Buckley*: the ability of the criminal process to ensure a fair trial.

Similarly, in *Marx v. Gumbinner*, *supra*, the plaintiff challenged a prosecutor's defamatory press release explaining the dismissal of rape charges against him. The sole injury alleged was damage to reputation.

All but one of the remaining cases relied on by Buckley in seeking *certiorari* are also inapposite because they did not involve an injury stemming from a criminal prosecution. In *Marrero v. City of Hialeah*, 625 F.2d 499, 511

(5th Cir. 1980), jewelry store owners challenged defamatory statements uttered by prosecutors when announcing their arrests for dealing in stolen property. The charges were soon dismissed and the owners' subsequent civil rights lawsuit alleged that the public statements harmed their business interests. In *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989), an exonerated defendant on bad check charges sued a prosecutor for damage to his reputation caused by defamatory statements delivered by a prosecutor in connection with plaintiff's arrest. The plaintiff in *Helstocki v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977), sued a U.S. Attorney for leaking confidential grand jury information in an attempt to destroy plaintiff's political prospects. Similarly, *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977), involved only a pendent state law defamation claim because the civil rights claim had been dismissed for lack of a constitutional injury under *Paul v. Davis*, 424 U.S. 693 (1976). Finally, the Seventh Circuit's splintered opinion in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980), never considered whether immunity should apply to a claim that a prosecutor's public statements deprived the plaintiff of a fair trial and fair bail. *See Buckley I*, 919 F.2d at 1243.

Only in *Powers v. Coe*, 728 F.2d 97, 103 (2nd Cir. 1984), did the plaintiff allege the denial of a fair trial attributable to a prosecutor's dealings with the media. In *Powers*, however, the prosecutor allegedly leaked substantial amounts of secret grand jury information in covert meetings with newspaper and television media representatives. Those private meetings resulted in more than 69 newspaper articles and television reports detailing the plaintiff's allegedly illegal activities. *See* 728 F.2d at 100. Accordingly, the prosecutor was not sued for making public statements at all, but rather, for covertly leaking secret information to

media representatives who then made the information public. None of the public policy reasons encouraging prosecutors to publicly announce indictments are furthered through immunizing covert leaks.

Moreover, to the extent the Second Circuit's decision in *Powers* is deemed analogous to the instant case, it is of questionable precedential value in light of the same court's prior decision in *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980). As previously explained, the Second Circuit held in *Lee* that immunity should apply even to investigative activities where the plaintiff seeks to "recover for an injury arising solely from the prosecution itself—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention." *Id.* at 322. Immunity is inapplicable only "where the alleged harm is inflicted independently of the prosecution." *Id.*

In light of the preceding explanation, the Seventh Circuit's grant of absolute immunity to J. Michael Fitzsimmons for announcing Petitioner's indictment was consistent with this Court's decisions in *Burns* and *Imbler*.

III.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE THREE EXPERT WITNESSES WHO TESTIFIED AS TO THE BOOT PRINT EVIDENCE WERE ABSOLUTELY IMMUNE FROM LIABILITY UNDER *BRISCOE v. LAHUE*.

Pursuant to *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Seventh Circuit granted immunity to the three expert witnesses who testified during the criminal prosecution as to the boot print evidence. Petitioner claims these experts are not immune because, in altering their reports, the experts engaged in non-testimonial acts pursuant to a conspiracy to "falsely arrest and imprison" Petitioner (Petition, p. 28).

As the Seventh Circuit aptly recognized, however, Petitioner's only injury occasioned by the expert witnesses stemmed from testimony rendered before the grand jury and at trial. Whether these witnesses engaged in non-immunized, non-testimonial conduct is irrelevant because Petitioner was not injured as a result of those acts, but rather, only through the introduction of the fruits of those acts at trial. As Judge Easterbrook wrote, "[i]t would be a hollow immunity if the aggrieved party could turn around and say, in effect: "True, your delivery of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony." *Buckley II*, 952 F.2d at 966, *citing Buckley I*, 919 F.2d at 1245.

Petitioner also perceives a conflict between the Seventh Circuit's opinion and the Second Circuit's decision in *White v. Frank*, 855 F.2d 956 (2nd Cir. 1988). In *White*, the court held that witness immunity does not apply to "complaining witnesses." By complaining witnesses, *White* spoke of witnesses who were responsible for the initiation of charges against a criminal defendant. 855 F.2d at 959-61.

As noted by the Seventh Circuit, none of the three experts who testified against Petitioner can properly be characterized as "complaining witnesses" who initiated the charges against Petitioner. *Buckley I*, 919 F.2d at 1245. None of these witnesses are alleged to have had any axe to grind with Petitioner, and all were contacted initially by the prosecutors, who sought their assistance in evaluating the strength of the evidence against Petitioner. *Id.* Indeed, other than a conclusory claim of conspiracy, the expert witnesses are not alleged to have had any active role in initiating Petitioner's prosecution other than through the furnishing of their expert opinions and tes-

timony. Though Petitioner alleges that the experts presented false opinions, the substance of those opinions does not make the experts "complaining witnesses." If such were the case, every expert witness who testifies in a criminal case would be subject to civil liability for rendering an opinion merely by virtue of a conclusory claim that they conspired to have the plaintiff arrested and imprisoned. Accordingly, although *White v. Frank* appears to suggest a questionable limitation on the scope of *Briscoe*,[5] the propriety of that limitation need not be resolved in this lawsuit. Petitioner's petition for *certiorari* should, therefore, be denied.

[5] In holding that *Briscoe* is not applicable to claims of false arrest and malicious prosecution, or other cases involving "complaining witnesses," the Second Circuit failed to consider that *Briscoe* itself involved so-called complaining witnesses. Both of the consolidated claims in *Briscoe* involved an alleged deprivation of the right to a fair trial. In each case, the civil rights defendant was a police officer who allegedly gave false testimony resulting in the plaintiff's convictions. *See Briscoe*, 460 U.S. at 326-27.

CONCLUSION

For the foregoing reasons, Respondents respectfully suggest that the Seventh Circuit's grant of immunity to the prosecutors and to the expert witnesses is consistent with this Court's opinion in *Burns v. Reed* and, for that reason, Petitioner's Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1992

STEPHEN BUCKLEY,

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.,

Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

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7/28/88	Plaintiff's First Amended Complaint
8/19/88	Answer of defendants Doria, Wilkosz, Vosburgh, Soucek, Lepic, Kurzawa, Burandt, Schmitt
8/19/88	Motion to Dismiss of defendants Fitzsimmons, Ryan, Kilander, Knight and King
8/19/88	Motion to Dismiss of defendants German, Olsen and Estate of Louise Robbins
8/19/88	Motion to Dismiss of County of DuPage
9/28/88	Defendant's memoranda of law in support of their motions to dismiss
12/13/88	Plaintiff's memoranda in response to defendants' motions to dismiss
1/24/89	Defendants' reply memoranda in support of their motions to dismiss
6/12/89	District Court ruling on motions to dismiss
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8/10/89	Judgment in a civil case
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12/5/90	Decision of the United States Court of Appeals for the Seventh Circuit

3/5/91	Petition for Writ of Certiorari filed in United States Supreme Court by Stephen Buckley
10/7/91	United States Supreme Court vacates judgment and remands to Court of Appeals for the Seventh Circuit for further consideration.
1/2/92	Decision of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHEN BUCKLEY Plaintiff, vs. COUNTY OF DUPAGE, RICHARD DORIA, WARREN WILKOSZ, THOMAS VOSBURGH, ROBERT SOUCEK, KENNETH LEPIC, DENNIS KURZAWA, JAMES BURANDT, DONALD SCHMITT, J. MICHAEL FITZSIMMONS, JAMES RYAN, ROBERT KILANDER, THOMAS KNIGHT, PATRICK KING, EDWARD GERMAN, ROBERT OLSEN, ESTATE OF LOUISE ROBBINS, JOHN DOE, PETER POE AND OTHERS NOT PRESENTLY KNOWN, Defendants.	)	No. 88 C 1939 Judge Leinenweber

FIRST AMENDED COMPLAINT JURISDICTION

1. The jurisdiction of the Court is invoked pursuant to the Civil Rights Act, 42 U.S.C. 1981, et seq.; the Judicial Code, 28 U.S.C. 1331 and 1343(3); the Constitution of the United States; and pendent jurisdiction.

PARTIES

1. Plaintiff STEPHEN BUCKLEY is a citizen of the United States and a resident of Aurora, Illinois.

2. Defendant COUNTY OF DuPAGE is a municipal corporation duly incorporated under the laws of the State of Illinois, and as such is responsible for the policies, practices, and customs of the DuPage County Sheriff's Department and States Attorney's Office, as well as for their employees, including the named Defendants herein.

3) Defendant RICHARD DORIA was, at all relevant times, the Sheriff of DuPage County and, as such, was, as a matter of law and fact, a final decisionmaker for DuPage County with regard to all the administrative, investigative, arrest, and custodial acts and decisions alleged herein.

4) Defendant ROBERT SOUCEK was, at all relevant times, Deputy Chief of the Criminal Bureau of the DuPage County Sheriff's Office.

5) Defendant Kenneth Lepic was, at all relevant times, a Lieutenant assigned to the Detective Division of the DuPage County Sheriff's Office.

6) Defendant JAMES BURANDT was, at all relevant times, a Sergeant assigned to the Detective Bureau of the DuPage County Sheriff's Office and was in charge of the evidence gathered in the Nicarico homicide investigation.

7) Defendants WARREN WILKOSZ, DENNIS KURZAWA, THOMAS VOSBURGH, JOHN DOE, and others not presently known were, at all relevant times, DuPage County Sheriff's police detectives and employees assigned to the Nicarico homicide investigation; additionally Defendant Wilkosz was assigned to work directly with the Defendant prosecutors on the Nicarico grand jury investigation.

8) Defendant DONALD SCHMITT was, at all relevant times, a DuPage County Deputy Sheriff assigned as a Quartermaster.

9) Defendant ED GERMAN was, at all relevant times, an employee of the Illlinois [sic] Department of Law Enforcement, assigned to their Bureau of Scientific Services.

10) Defendant ROBERT OLSEN was, at all relevant times, an employee of the Kansas Bureau of Investigation, assigned to their Crime Laboratory.

11) Defendant LOUISE ROBBINS, an anthropologist and now deceased, was, at all relevant times, a resident of North Carolina. The Estate of Louise Robbins is administered by Margaret Bushnell, 1500 Cardiff Lane, High Point, North Carolina.

12) Defendant J. MICHAEL FITZSIMMONS was the duly elected DuPage County State's Attorney, from November, 1968 to November, 1984 and as such was, as a matter of law and fact, a final decisionmaker for DuPage County with regard to all the administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

13) Defendant JAMES RYAN has been, from November, 1984 to the present the duly elected DuPage County State's Attorney, and as such was and is, as a matter of law and fact, a final decision maker with regard to all administrative, investigative, arrest, custodial, and prosecutorial acts and decisions alleged herein.

14) Defendant THOMAS KNIGHT was, until November of 1984, Assistant DuPage County States

Attorney in charge of the Criminal Division and was assigned to the Nicarico investigation and prosecution; thereafter he was a duly appointed DuPage County Special Prosecutor appointed for the express purpose of investigating and prosecuting the Nicarico case.

15) Defendant ROBERT KILANDER has been, from December of 1984 to the present, the First Assistant States Attorney of DuPage County, and, after the Plaintiff's hung jury and resultant mistrial, was assigned to the Nicarico investigation and Plaintiff's re-prosecution.

16) Defendant PATRICK KING was, at all relevant times, an Assistant DuPage County States Attorney assigned to the Nicarico case investigation and prosecution.

17) Defendants PETER POE, and others yet unknown are assistant DuPage County States Attorneys.

18) At all relevant times, each of the above named Defendants were acting under color of law, or jointly and/or in conspiracy with those who were so acting, and are sued in their individual and official capacities.

FACTS

19) On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, Illinois, sexually abused, and murdered. Her body was found a few days later along the Prairie Path, in DuPage County.

20) An intensive investigation into the murder was commenced by the DuPage County Sheriff's Office and the DuPage County States Attorneys Office, under the

direction and responsibility of Defendant Sheriff Doria and Defendant States Attorney Fitzsimmons, respectively.

21) Ever since the abduction, there has been extensive publicity about, and interest in, the Nicarico case, which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon the Defendants to find someone to charge and prosecute for this heinous crime.

22) In the early stages of the investigation, a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time, a mentally disturbed and totally incredible person, Alex Hernandez, allegedly told Sheriff's detectives that Plaintiff Stephen Buckley was present for a post murder conversation in which the murder was discussed.

23) On that basis, Sheriff's detectives went to Plaintiff's home and questioned Plaintiff without a lawyer. He denied any knowledge of the crime, and voluntarily produced his boots. At about the same time, a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description was supplied to the Defendants. The description and sketch were dissimilar to Plaintiff.

24) At the direction of Defendant Sheriff Doria, John Gorayczyk, the Sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of the Plaintiff's boots with the bootprint on the Nicarico door, and concluded that they did not match.

25) Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab, and immediately communicated it to, *inter alia*, Defendants Doria, Soucek, Burandt and Schmitt. These conclusions became general knowledge among all of the Sheriffs' police Defendants, and, either at that time or subsequent thereto, were made known to Defendants Fitzsimmons, Knight and King.

26) Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to Defendant Edward German of the Illinois Department of Law Enforcement Crime Lab for examination.

27) Defendant German examined the boots and at first concluded in handwritten notes that Plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that the Plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to Defendant Burandt, and the contents were shared with the Sheriff, States Attorney and their Defendant-subordinates.

28) Defendant Knight, and various others [sic] Defendants, including Doria, Fitzsimmons, and Burandt, apparently not satisfied with Defendant German's conclusions, contacted anthropologist Louise Robbins and Defendant Olsen of the Kansas Bureau of Indentification [sic] Crime Lab in search of a positive boot identification.

29) Defendant Olsen, after reviewing Defendant German's notes and report, and without the benefit of the boot itself, concluded that Plaintiff's boot and the

Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification."

30) Defendant Olsen reduced these findings to a report, which was sent, along with German's report and notes, to Defendants Knight and German. Defendant Knight shared Olsen's conclusions with Defendant Burandt, and, with various other Defendants, including Fitzsimmons, King, Doria, Soucek, and Wilkosz.

31) Confronted with three different expert reports which failed to match Plaintiff's boot with the footprint on the door, the Defendants, including Knight, Burandt, and German, procured their "positive identification" from Louise Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these Defendants knew or should have known.

32) Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including Defendants Wilkosz and Kurzawa, at the direction and under the supervision, and sometimes in the presence and with the assistance of Defendants Knight, King, Soucek and Lepic, repeatedly interrogated alleged suspects including Plaintiff Buckley and Alex Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, Plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and

palpably false stories that his mental instability was obvious to the Defendants.

33) As a result of these interrogations, at least one experienced Sheriff's detective who participated concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence."

34) He repeatedly communicated his conclusion, and its basis, to the Defendants named herein, including Defendants Doria, Knight, King, Soucek, Lepic, and Wilkosz.

35) Unable to solve the case, Defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case.

36) Defendants Knight, King, Doria, Soucek, Lepic and Wilkosz, with the knowledge and approval of Defendant Fitzsimmons, used the grand jury as an investigative tool, *inter alia*, by further interrogating, intimidating, and badgering potential suspects, including the Plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong armed interrogation techniques by Defendant Knight, Plaintiff Buckley continued to maintain his innocence before the Grand Jury and again demonstrated no knowledge of the crime.

37) Defendants Knight, King, Wilkosz, and Burandt, with the knowledge of Defendants Fitzsimmons, Doria, Soucek, and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence, while intentionally withholding Gorayczyk's

findings, as well as misrepresenting Olsen and German's conclusions.

38) Moreover, they presented a large amount of obviously incredible, irrevelant, false, and contradictory hearsay and double hearsay evidence designed to improperly prejudice the Plaintiff and (illegible) suspects before the jury.

39) The Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Alex Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the Grand Jury despite the fact that they were independently shown to be false and completely unreliable by further investigation.

40) Those Defendants, including Defendants Vosburgh and Knight, also interrogated another suspect, Rolando Cruz, without counsel, and gave him financial payments and a rent free apartment in exchange for inculpatory testimony which was also placed before the Grand Jury despite its obvious lack of credibility.

41) Despite this unremitting abuse of the grand jury process, and after more than 8 months of "evidence" and over 100 witnesses were presented to the Grand Jury, Defendant Fitzsimmons publicly admitted, on January 27, 1984, that there was insufficient evidence to indict or prosecute. This was four months *after* the bootprint evidence had been presented to the Grand Jury.

42) On March 9, 1984, twelve days before the Republican primary election in which Defendant Fitzsimmons was facing the challenge of Defendant Ryan, Defendants Fitzsimmons, Knight, King, and Doria obtained grand jury indictments for murder, rape, and burglary against Plaintiff Buckley, Alex Hernandez, and Rolando Cruz. No new evidence of importance was presented after January 27th.

43) The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to cover up their inability to solve the crime, to aid Defendant Fitzsimmons in his political campaign, and to further coerce the Plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other.

44) Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the bootprint evidence, led to the conclusion that the Plaintiff and his co-indictees, along with some other unindicted suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of the Plaintiff and his co-indictees to the media, which were prominently and repeatedly displayed on television and in the newspapers.

45) These false and prejudicial statements inflamed the populace of DuPage County against the Plaintiff and his co-indictees.

46) The Defendants, at the direction of Defendants Doria, Knight and Soucek then arrested and imprisoned Plaintiff Buckley and his co-indictees on 3 million dollars

bond, and Defendants Knight, King, and various Defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-Defendants.

47) Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-Defendant Hernandez retracted his prior "admissions", while being interrogatored [sic] by Defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by the Defendants.

48) These post-indictment interrogations further reinforced the conclusion that the Plaintiff and his co-indictees were not involved in the Nicarico murder, and this fact was repeatedly reaserted [sic] to the Defendants, including Doria, Soucek, Knight, and King, by the same sheriff's detective who had previously done so.

49) The Defendants continued to ignore this detective's conclusions, and after he pursued a lead concerning another *Nicarico* suspect, he was removed from the Nicarico investigation and given unfavorable assignments, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons.

50) The Defendants, including Knight, King, Doria, Soucek, Burandt, and Lepic, secreted the Gorayczyk boot evidence from the Plaintiff and his defense lawyers, who only discovered this information by independent investigation on the eve of trial.

51) In March of 1984 Defendant Ryan defeated Defendant Fitzsimmons in the Republican Primary for DuPage County States Attorney and in November of 1984 Ryan won the general election.

52) In December of 1984 Defendant Ryan assumed the duties of DuPage County States Attorney, appointed Defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of the Plaintiff and his co-indictees.

53) The Defendants, including Defendants Knight, Doria, Burandt, German, Olsen, Schmitt, and Robbins, continued to construct and shape their boot "evidence" which was designed to falsely implicate the Plaintiff, despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door, and which otherwise established that he was not involved in the crime.

54) In January of 1985 Defendants Knight and King, with the approval and under the supervision of Defendants Ryan and Kilander, proceeded to select a jury and jointly try the Plaintiff and his co-Defendants in a highly prejudicial and inflamed atmosphere, occasioned, at least in part, by public statements made and/or prompted by the Defendants.

55) At trial the Defendant prosecutors presented as the cornerstone of their case against Plaintiff, manufactured boot "evidence" through Defendants Robbins, German, Schmitt and Olsen, who presented false opinions, which, in the case of Olsen and German, were significantly at variance from their original reports and notes.

56) At trial the Defendant prosecutors also presented the false inculpatory statements of Plaintiff's co-Defendants which had been obtained by the Defendants' coercive interrogations, promises of rewards, and other financial inducements.

57) Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured, and unfairly prejudicial evidence, the jury, while convicting Plaintiff's co-Defendants, were hung as to the Plaintff's [sic] guilt or innocence, and the Court declared a mistrial.

58) Nonetheless the Defendants, including Ryan, Kilander, Doria, Soucek, Knight, and King, immediately decided to continue Plaintiff's imprisonment and to retry him. Defendant Knight publicly announced this decision directly after the verdicts were returned, and it was widely reported in the media.

59) Defendant Fitzsimmons made additional post trial statements which ware published in which he falsely claimed that Plaintiff was guilty of raping and killing Jeanine Nicarico, while the Defendant States Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements, and to manipulate the press coverage by, inter alia, prompting the Nicarico family and friends to make inflammatory public statements that the Plaintiff was guilty of the crime.

60) In June of 1985 Brian Dugan of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985, with the murder and rape of 7 year old Melissa Ackerman of LaSalle County. The Defendants were immediately put on notice by the recently resigned

Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder, because of the similiarities [sic] between the two crimes.

61) Within a week, Dugan admitted to his public defender that he had not only murdered and raped Melissa Ackerman, but also that he murdered and raped Jeanine Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder.

62) In November of 1985, the details of Dugan's Nicarico confession, which included the fact that he acted alone, and details which had not been publicly revealed and could only be known to the murderer, were conveyed to Defendants Knight, Kilander, and then to the other Defendants, including Ryan, Doria, Soucek, and Lepic.

63) Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes, in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County Defendants, including Ryan, Doria, Knight, Kilander, Soucek and Lepic, refused, and instead again decided to continue Plaintiff's arrest, imprisonment, and re-prosecution.

64) They persisted in this decision even after Dugan passed a December, 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month.

65) Furthermore, Defendant Knight made false and misleading statements which were published in the

media and which were designed to discredit Dugan's confession, to further prejudice the Plaintiff, and to justify his continued arrest, imprisonment and prosecution.

66) In June of 1986 Plaintiff's defense lawyers presented additional evidence – the conclusion of a highly respected F.B.I. footprint expert that Buckley's shoe did not make the Nicarico print – to the Defendants, but they nonetheless continued the arrest, imprisonment and prosecution of the Plaintiff and opposed the lowering of Plaintiff's bond from $3 million.

67) In September of 1986, Defendant Kilander interrogated a DuPage County prisoner who allegedly told him that Plaintiff had made a highly inculpatory statement to him.

68) On September 19, 1986, during jury selection for Plaintiff's retrial, Defendants Knight and Kilander informed the Court of this purported statement, and as a result Plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter, Plaintiff's lawyers established that it was physically impossible for the Plaintiff to have made the statement, and further, the prisoner denied telling Kilander that Plaintiff had made the statement.

69) In January of 1987, the Defendants sought another continuance in Plaintiff's retrial, claiming that their anthropologist "expert", Louise Robbins, was seriously ill, and, although able to testify, could not travel from her North Carolina home.

70) Fearing that Robbins was terminally ill, Plaintiff's defense lawyers sought a video-taped examination

of her for use at the retrial, but the Defendants opposed this request, and it was denied.

71) Mrs. Robbins died a short time later, and in March 1987, the Defendants dismissed Plaintiff's prosecution and terminated his arrest and imprisonment, three years after Plaintiff was arrested.

72) The Defendants, including Defendants Ryan, Doria, Knight, Kilander, King, Soucek and Lepic decided to use the pretext of Mrs. Robbins' death to publicly explain the dismissal rather than to admit that the Plaintiff was innocent of the Nicarico murder and that they had arrested, imprisoned, and prosecuted the wrong men.

73) This pretextual reason was asserted publicly by these Defendants and widely reported by the media.

74) The Defendants, to this day, still refuse to admit that they arrested, imprisoned, and prosecuted the wrong men, and in furtherance of this continued cover up, have refused to dismiss the case against Plaintiff's Co-Defendants, who were sentenced to death plus 255 years and who they are now reprosecuting after their convictions were reversed on appeal.

75) Plaintiff has a continuing and unremitting fear that the Defendants will re-arrest, re-imprison, and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit.

COUNT 1
(42 USC 1983 Claim)

76) Plaintiff realleges paragraphs 1-75

77) The acts and omissions of the Defendants, as alleged above, were done under color of law and without probable cause, thereby constituting false arrest and imprisonment, in violation of Plaintiff Buckley's fourth and fourteenth amendment rights and 42 USC 1983.

78) These acts and omissions also violated Plaintiff's right to a fair trial, were done to publicly prejudice and defame him, and were committed, inter alia, in order to cover up the Defendants' failure to solve the crime, to cover up their arrest, imprisonment and prosecution of the wrong men, and to further Defendant Fitzsimmons and Doria's political career, in violation of Plaintiff's 14th Amendment right to due process of law, and 42 USC 1983. These due process violations also directly caused the jury to be deadlocked, rather than to acquit Plaintiff, thereby directly causing his continued imprisonment for an additional two years.

79) These acts and omissions, including, *inter alia*, the abuse of the grand jury process and its power to indict, also violated Plaintiff's right to counsel and to remain silent, in violation of his fifth, sixth and fourteenth amendment rights, and 42 USC 1983.

80) Furthermore each Defendant reached an understanding, engaged in a sequence of events, or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of Plaintiff Buckley, with the mutual purpose, objective and/or knowledge that it would deprive him of said rights.

81) Said conspirac(ies)/joint action(s) was/were effected under color of law and violated Plaintiff's fourth, fifth, sixth, and fourteenth amendment rights. The overt acts in furtherance of the conspirac(ies)/joint action(s) are set forth in paragraphs 19-75 above.

82) These acts and omissions directly and proximately injured Plaintiff Stephen Buckley by causing him pain, suffering, fear, mental anguish, humiliation, defamation, loss of work, loss of freedom, and out of pocket costs and expenses, which injuries continue to this day and will continue in the future.

Wherefore, Defendant Buckley demands judgment, jointly and severally, against each and every Defendnt [sic] named in this complaint except the County of DuPage, in the amount of $5 million dollars, plus punitive damages in the amount of $3 million dollars against each of those same Defendants, individually, plus costs, attorneys fees, and whatever additional relief this Court deems just and equitable.

COUNT II
(1983 *Monell* claim)

83) Plaintiff realleges paragraphs 1-82.

84) Defendant Doria, as Sheriff of DuPage County, and Defendants Fitzsimmons and Ryan, as the duly elected States Attorney of DuPage County, were, by operation of state law and as a matter of fact, the final decisionmakers with regard to the investigative, prosecutorial, arrest, custodial, and administrative acts and decisions which they are above alleged to have made

or participated in. Moreover, certain other acts and decisions made by Defendants Knight, Kilander, Soucek and Lepic were in areas where final decision making powers had been delegated to them by the Sheriff and/or States Attorney.

85) These acts, edicts, and decisions, directly and proximately caused the constitutional violations and injury to the Plaintiff, and are directly chargeable to the Defendant County of DuPage because of their status as final decisionmakers.

86) Additionally, or alternatively, the County of DuPage, through its Sheriff's Department and its States Attorneys Office, has *de facto* policies, practices, and customs, including one which provided that evidence exculpatory to the target of the grand jury or that otherwise negates probable cause is not presented to the Grand Jury.

87) Said *de facto* policies, practices, and customs were a direct and proximate cause of Plaintiff's injuries and Constitutional violations, thereby making them directly chargeable to the County of DuPage.

Wherefore Plaintiff Buckley demands judgment, in the amount of $5,000,000 against the County of DuPage, and against Defendants Doria, Fitzsimmons, Ryan, Soucek, Kilander and Lepic in their official capacity, and since the policy was implemented with malicious intent, $3,000,000 in punitive damages, plus costs, attorneys fees, and whatever additional relief this Court finds equitable and just.

COUNT III

(Pendent state law claim for false arrest, imprisonment, malicious prosecution and defamation under Illinois and common law)

88) Plaintiffs reallege paragraphs 1-87.

89) Defendants named in paragraphs 1-18 above falsely arrested and imprisoned Plaintiff Stephen Buckley, without probable cause, and with malicious intent, and likewise initiated and continued a malicious prosecution, without probable cause, against him, which was ultimately determined in Plaintiff's favor, and published or caused to be published false and defamatory statements concerning the Plaintiff. These actions directly and proximately caused the injuries and damages to Plaintiff as claimed above, and are actionable under Illinois and common law.

WHEREFORE, Plaintiff Buckley prays for damages in the amount of $5,000,000 in actual and compensatory damages, jointly and severally, against each and every named Defendant except the County of DuPage and Defendant Burandt, plus punitive damages in the amount of $3,000,000 against each of these same Defendants, plus costs, attorneys fees and whatever additional relief this Court deems equitable and just.

COUNT IV

(Pendent Claim for Intentional Infliction of Emotional Distress under Illinois law)

90) Plaintiff realleges paragraphs 1-84.

91) The arrest, imprisonment, prosecution, and defamation of Plaintiff Stephen Buckley, as set forth above,

were done recklessly, intentionally or with gross negligence, and directly and proximately inflicted emotional distress upon Plaintiff, in violation of Illinois and common law.

WHEREFORE, Plaintiff Stephen Buckley prays for damages in the amount of $5,000,000 in actual or compensatory damages for each of them, jointly and severally, against all named Defendants except Defendants DuPage County and Burandt, plus punitive damages in the amount of $3,000,000 for each of them against these same Defendants, plus attorneys fees.

COUNT V

(Conspiracy to falsely arrest, imprison and maliciously prosecute, intentionally inflict emotional distress and defame under Illinois law)

92) Plaintiff realleges paragraphs 1-91.

93) The conspirac(ies) as alleged in Count I above also constitutioned [sic] conspirac(ies)/joint action(s) to falsely arrest, imprisoned, maliciously prosecute, intentionally inflict emotional distress, and defame Plaintiff Stephen Buckley, under Illinois and common law, proximately causing injury and damages to him as alleged above.

COUNT VI

(Pendent *respondeat superior* claim under state law)

94) Plaintiff realleges paragraphs 1-93.

95) The individual Defendants named above, were, at all relevant times, employees and agents of the Defendant County of DuPage, were acting within the scope of their employment, and their acts and omissions, as alleged in Counts III, IV and V, are therefore directly chargeable to the County under state law by *respondeat superior.*

Wherefore, Plaintiff Stephen Buckley prays for damage in the amount of $5,000,000 in actual and compensatory damages jointly and severally, plus punitive damages in the amount of $3,000,000 against the Defendant County of DuPage, plus costs, attorneys fees, and whatever additional relief this Court deems equitable and just.

PLAINTIFF DEMANDS TRIAL BY JURY.

Respectfully submitted,

Dated: July 27, 1988

/s/ G. Flint Taylor
G. FLINT TAYLOR
JOHN L. STAINTHORP
Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

MEMORANDUM OPINION AND ORDER

(June 9, 1989)

Plaintiff's six-count complaint is brought under the Civil Rights Act, 42 U.S.C. § 1983, and includes various pendent state claims, arising from plaintiff's arrest and subsequent prosecution for the murder of eleven-year old Jeanine Nicarico ("Nicarico") on February 25, 1983. Plaintiff sues the County of DuPage, Sheriff Richard Doria ("Doria") and several of his deputies, State's Attorney James Ryan ("Ryan"), former State's Attorney J. Michael Fitzsimmons ("Fitzsimmons"), several Assistant State's Attorneys, and three expert witnesses who testified during plaintiff's prosecution. The claims include false arrest and imprisonment, malicious prosecution, defamation, and the denial of plaintiff's (1) right to a fair trial; (2) right to counsel; and (3) right to silence. In addition, plaintiff alleges that each defendant conspired to violate his constitutional rights.

On August 19, 1988 an answer denying the allegations of illegal and unconstitutional conduct was filed on behalf of Doria and all Sheriff's deputies.

The defendant State's Attorneys as well as the state's so-called "expert witnesses" have moved to dismiss on the ground of absolute privilege. In the alternative they move to dismiss on the ground of qualified privilege. The County of DuPage has moved to dismiss the *Monell* policy claim against it on the basis that it cannot legally be

responsible for the policies, practices and customs of either the County Sheriff or the State's Attorney.

FACTS[1]

On February 25, 1983, eleven-year old Nicarico was abducted from her home in Naperville, Illinois, sexually abused and murdered. Her body was found a few days later along the Prairie Path in DuPage County. (¶19)

An intensive investigation into the murder was commenced by the DuPage County Sheriff's office and the DuPage County State's Attorney's office, under the direction and responsibility of defendant Sheriff Doria and defendant State's Attorney Fitzsimmons, respectively. (¶20)

Ever since the abduction there has been extensive publicity about and interest in the Nicarico case which, in DuPage County at least, has engendered intense emotions in the community. This climate exerted great public pressure upon defendants to find someone to charge and prosecute for this heinous crime. (¶21)

In the early stages of the investigation a bootprint was discovered on the door of the Nicarico home. Sheriff's detectives concluded that it was left by the killer when he kicked in the door. At approximately the same time a mentally disturbed and totally incredible person, Alex Hernandez ("Hernandez"), allegedly told Sheriff's detectives that plaintiff Stephen Buckley ("Buckley") was

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[1] The facts are taken from the complaint and are referenced by paragraph ("¶ ___").

present for a post-murder conversation in which the murder was discussed. (¶22)

On that basis Sheriff's detectives went to plaintiff's home and questioned plaintiff without a lawyer. He denied any knowledge of the crime and voluntarily produced his boots. At about the same time a description of a person allegedly seen in the area of the Nicarico home on the afternoon of the abduction, and an FBI composite sketch drawn from the description, was supplied the defendants. The description and sketch were dissimilar to plaintiff. (¶23)

At the direction of defendant Sheriff Doria, John Gorayczyk ("Gorayczyk"), the sergeant in charge of the identification section of the DuPage County Crime Lab, made a comparative examination of plaintiff's boots with the bootprint on the Nicarico door and concluded that they did not match. (¶24)

Gorayczyk confirmed his conclusion with the head of the DuPage County Crime Lab and immediately communicated it, *inter alia*, to defendants Doria, Robert Soucek ("Soucek"), James Burandt ("Burandt") and Donald Schmitt ("Schmitt"). These conclusions became general knowledge among all of the Sheriff's police defendants and, either at the time of subsequent thereto, were made known to defendants Fitzsimmons, Thomas Knight ("Knight") and Patrick King ("King"). (¶25)

Defendant Doria then caused the boots to be removed from Gorayczyk's custody before he could complete his tests and write a report, and Doria sent them to defendant Edward German ("German") of the Illinois

Department of Law Enforcement Crime Lab for examination. (¶26)

Defendant German examined the boots and at first concluded in handwritten notes that plaintiff's boot "could have at best" made the footprint on the door and that "another shoe could very well have made the prints." In his official report he simply concluded that plaintiff's boot "could have" made the prints and omitted the remainder of his prior conclusions. His report and his notes were sent to defendant Burandt and the contents were shared with the Sheriff, the State's Attorney, and their defendant-subordinates. (¶27)

Defendant Knight and various other defendants, including Doria, Fitzsimmons and Burandt, apparently not satisfied with defendant German's conclusions, contacted anthropologist Louise Robbins ("Robbins") and defendant Olsen of the Kansas Bureau of Identification Crime Lab in search of a positive boot identification. (¶28)

Defendant Olsen, after reviewing defendant German's notes and report, and without the benefit of the boot itself, concluded that plaintiff's boot and the Nicarico bootprint had some "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification." (¶29)

Defendant Olsen reduced these findings to report which was sent, along with German's report and notes, to defendants Knight and German. Defendant Knight shared Olsen's conclusions with defendant Burandt and with various other defendants, including Fitzsimmons,

King, Doria, Soucek and Warren Wilkosz ("Wilkosz"). (¶30)

Confronted with three different expert reports which failed to match plaintiff's boot with the footprint on the door, defendants, including Knight, Burandt and German, procured their "positive identification" from Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these defendants knew or should have known. (¶31)

Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including defendants Wilkosz and Dennis Kurzawa ("Kurzawa"), at the direction and under the supervision and sometimes in the presence and with the assistance of defendants Knight, King, Soucek and Kenneth Lepic ("Lepic"), repeatedly interrogated alleged suspects, including plaintiff Buckley and Hernandez, who were not represented by counsel. Despite intense pressure and intimidation, plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to defendants. (¶32)

As a result of these interrogations, at least one experienced Sheriff's detective who participated, concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint "evidence." (¶33)

He repeatedly communicated his conclusion and its basis to the defendants named herein, including defendants Doria, Knight, King, Soucek, Lepic and Wilkosz. (¶34)

Unable to solve the case, defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County "investigative" grand jury, devoted solely to investigating the Nicarico case. (¶35)

Defendants Knight, King, Doria, Soucek, Lepic and Wilkosz, with the knowledge and approval of defendant Fitzsimmons, used the grand jury as an investigative tool, *inter alia*, by further interrogating, intimidating and badgering potential suspects, including plaintiff, when they were called before it without counsel. Despite this utilization of unabashedly strong-armed interrogation techniques by defendant Knight, plaintiff Buckley continued to maintain his innocence before the grand jury and again demonstrated no knowledge of the crime. (¶36)

Defendants Knight, King, Wilkosz and Burandt, with the knowledge of defendants Fitzsimmons, Doria, Soucek and Lepic, further abused the grand jury process by presenting only the "favorable" portions of the boot evidence while intentionally withholding Gorayczyk's findings, as well as misrepresenting Olsen and German's conclusions. (¶37)

Moreover, they presented a large amount of obviously incredible, irrelevant, false and contradictory hearsay and double hearsay evidence designed to improperly prejudice the plaintiff and other suspects before the grand jury. (¶38)

Defendants, including Doria, Soucek, Lepic, Knight, King and Wilkosz, also offered reward money, which induced suspect Hernandez to make further false, inculpatory statements in pursuit of the money; those statements were placed before the grand jury despite the fact that they were independently shown to be false and completely unreliable by further investigation. (¶39)

Those defendants, including defendants Thomas Vosburgh and Knight, also interrogated another suspect, Rolando Cruz ("Cruz"), without counsel and gave him financial payments and a rent-free apartment in exchange for inculpatory testimony, which was also placed before the grand jury despite its obvious lack of credibility. (¶40)

Despite this unremitting abuse of the grand jury process, and after more than eight months of "evidence" and over one hundred witnesses presented to the grand jury, defendant Fitzsimmons publicly admitted on January 27, 1984 that there was insufficient evidence to indict or prosecute. This was four months *after* the bootprint evidence had been presented to the grand jury. (¶41)

On March 9, 1984, twelve days before the Republican primary election in which defendant Fitzsimmons was facing the challenge of defendant Ryan, defendants Fitzsimmons, Knight, King and Doria obtained grand jury indictments for murder, rape and burglary against plaintiff Buckley, Hernandez and Cruz. No new evidence of importance was presented after January 27th. (¶42)

The indictments were obtained despite the absence of probable cause in order to defuse public pressure, to

cover up their inability to solve the crime, to aid defendant Fitzsimmons in his political campaign, and to further coerce plaintiff and his co-indictees to reveal information about the crime and/or falsely inculpate themselves or each other. (¶43)

Defendant Fitzsimmons publicly announced the indictments, falsely asserting that numerous pieces of evidence, including the bootprint evidence, led to the conclusion that plaintiff and his co-indictees, along with some other unindicated suspects, were part of a burglary ring who committed the Nicarico crime. He released "mug shots" of plaintiff and his co-indictees to the media which were prominently and repeatedly displayed on television and in the newspapers. (¶44)

These false and prejudicial statements inflamed the populace of DuPage County against plaintiff and his co-indictees. (¶45)

Defendants, at the direction of defendants Doria, Knight and Soucek, then arrested and imprisoned plaintiff Buckley and his co-indictees on three million dollars bond, and defendants Knight, King and various defendant Sheriff's detectives again interrogated them, offering them grace from the death penalty if they made false admissions or bore false witness against their co-defendants. (¶46)

Plaintiff Buckley continued to maintain his innocence and to deny knowledge of the murder, while co-defendant Hernandez retracted his prior "admissions" while being interrogated by defendants Knight and King, stating that he had made them in an attempt to obtain the reward money offered by defendants. (¶47)

These post-indictment interrogations further reinforced the conclusion that plaintiff and his co-indictees were not involved in the Nicarico murder and this fact was repeatedly reasserted to defendants, including Doria, Soucek, Knight and King, by the same Sheriff's detective who has previously done so. (¶48)

Defendants continued to ignore this detective's conclusions and after he pursued a lead concerning another *Nicarico* suspect he was removed from the Nicarico investigation and given unfavorable statements, compelling him to resign from the force. The head of the DuPage County Crime Lab was forced to resign for similar reasons. (¶49)

Defendants, including Knight, King, Doria, Soucek, Burandt and Lepic, secreted the Gorayczyk boot evidence from plaintiff and his defense layers, who only discovered this information by independent investigation on the eve of trial. (¶50)

In March of 1984 defendant Ryan defeated defendant Fitzsimmons in the Republican primary for DuPage County State's Attorney, and in November of 1984 Ryan won the general election. (¶51)

In December of 1984 defendant Ryan assumed the duties of DuPage County State's Attorney, appointed defendant Knight as the special Nicarico case prosecutor, and approved and authorized the continued imprisonment and prosecution of plaintiff and his co-indictees. (¶52)

Defendants, including defendants Knight, Doria, Burandt, German, Olsen, Schmitt and Robbins, continued

to construct and shape their boot "evidence," which was designed to falsely implicate plaintiff despite all the contrary evidence which demonstrated that his boot did not make the print on the Nicarico door and which otherwise established that he was not involved in the crime. (¶53)

In January of 1985 defendants Knight and King, with the approval and under the supervision of defendants Ryan and Robert Kilander ("Kilander"), proceeded to select a jury and jointly try plaintiff and his co-defendants in a highly prejudicial and inflamed atmosphere, occasioned at least in part by public statements made and/or prompted by defendants. (¶54)

At trial defendant prosecutors presented as the cornerstone of their case against plaintiff, manufactured boot "evidence" through defendants Robbins, German, Schmitt and Olsen, who presented false opinions which, in the case of Olsen and German, were significantly at variance from their original reports and notes. (¶55)

At trial defendant prosecutors also presented the false inculpatory statements of plaintiff's co-defendants which had been obtained by defendants' coercive interrogations, promises or rewards, and other financial inducements. (¶56)

Despite this highly charged and prejudicial atmosphere and the presentation of this manufactured and unfairly prejudicial evidence, the jury, while convicting plaintiff's co-defendants, were hung as to plaintiff's guilt or innocence and the court declared a mistrial. (¶57)

Nonetheless, defendants, including Ryan, Kilander, Doria, Soucek, Knight and King, immediately decided to

continue plaintiff's imprisonment and to re-try him. Defendant Knight publicly announced this decision directly after the verdicts were returned and it was widely reported in the media. (¶58)

Defendant Fitzsimmons made additional post-trial statements which were published in which he falsely claimed that plaintiff was guilty of raping and killing Nicarico, while defendant State's Attorneys and Sheriff's police, including Knight and Doria, continued to make prejudicial public statements and to manipulate the press coverage, *inter alia*, prompting the Nicarico family and friends to make inflammatory public statements that plaintiff was guilty of the crime. (¶59)

In June of 1985 Brian Dugan ("Dugan"), of Aurora, Illinois, was charged with several sexual assaults in Kane County, and on June 25, 1985 with the murder and rape of seven-year old Melissa Ackerman ("Ackerman") of LaSalle County. Defendants were immediately put on notice by the recently resigned Sheriff's detective that they should investigate Dugan as a potential suspect in the Nicarico murder because of the similarities between the two crimes. (¶60)

Within a week Dugan admitted to his public defender that he had not only murdered and raped Ackerman but also that he murdered and raped Nicarico and a woman named Donna Schnnor. The public defender then took a detailed statement from Dugan concerning the Nicarico murder. (¶61)

In November of 1985 the details of Dugan's Nicarico confession, which included the fact that he acted alone and details which had not been publicly revealed and

could only be known to the murderer, were conveyed to defendants Knight and Kilander, and then to the other defendants, including Ryan, Doria, Soucek and Lepic. (¶62)

Dugan's attorney proposed that Dugan would plead guilty to these three murders and rapes in exchange for life sentences; the Kane and LaSalle County prosecutors accepted, but the DuPage County defendants, including Ryan, Doria, Knight, Kilnder, Soucek and Lepic, refused and instead again decided to continue plaintiff's arrest, imprisonment and re-prosecution. (¶63)

They persisted in this decision even after Dugan passed a December 1985 polygraph test in which he repeated his admission that he alone committed the Nicarico murder, and again after he gave a detailed videotaped confession while under hypnosis later the same month. (¶64)

Furthermore, defendant Knight made false and misleading statements which were published in the media and which were designed to discredit Dugan's confession, to further prejudice plaintiff, and to justify his continued arrest, imprisonment and prosecution. (¶65)

In June of 1986 plaintiff's defense lawyers presented additional evidence – the conclusion of a highly respected FBI footprint expert that Buckley's shoe did not make the Nicarico bootprint – defendants but they nonetheless continued the arrest, imprisonment and prosecution of plaintiff and opposed the lowering of plaintiff's bond from three million dollars. (¶66)

In September of 1986 defendant Kilander interrogated a DuPage County prisoner who allegedly told him that plaintiff had made a highly inculpatory statement to him. (¶67)

On September 19, 1986, during jury selection for plaintiff's retrial, defendants Knight and Kilander informed the court of this purported statement and as a result plaintiff's trial was aborted. The statement appeared in the media the next week and shortly thereafter plaintiff's lawyers established that it was physically impossible for plaintiff to have made the statement, and further, the prisoner denied telling Kilander that plaintiff had made the statement. (¶68)

In January of 1987 defendants sought another continuance in plaintiff's retrial, claiming that their anthropologist "expert," Robbins, was seriously ill and although able to testify could not travel from her North Carolina home. (¶69)

Fearing that Robbins was terminally ill, plaintiff's defense lawyers sought a video-taped examination for her use at the trial but defendants opposed this request and it was denied. (¶70)

Robbins died a short time later, and in March of 1987 defendants dismissed plaintiff's prosecution and terminated his arrest and imprisonment, three years after plaintiff was arrested. (¶71)

Defendants, including defendants Ryan, Doria, Knight, Kilander, King, Soucek and Lepic, decided to use the pretext of Robbins' death to publicly explain the dismissal rather than to admit that plaintiff was innocent

of the Nicarico murder and that they had arrested, imprisoned and prosecuted the wrong men. (¶72)

This pretextual reason was asserted publicly by these defendants and widely reported by the media. (¶73).

Defendants to this day still refuse to admit that they arrested, imprisoned and prosecuted the wrong men, and in furtherance of this continued cover up have refused to dismiss the case against plaintiff's co-defendants, who were sentenced to death plus two hundred twenty-five years, and who they are now re-prosecuting after their convictions were reversed on appeal. (¶74)

Plaintiff has a continuing and unremitting fear that defendants will re-arrest, re-imprison and re-prosecute him for the Nicarico murder despite his clear innocence, particularly in retribution for his filing and pursuing this lawsuit. (¶75)

DISCUSSION

I. The State's Attorneys' Motion

The complaint indicates that the murder of eleven year old Nicarico and the subsequent indictment of plaintiff occurred during the term of office of former State's Attorney Fitzsimmons. In March of 1984 Fitzsimmons was defeated in the Republican primary by the current State's Attorney Ryan, who succeeded him has State's Attorney when his term concluded in December of 1984. Kilander served as Ryan's first Assistant State's Attorney during his term and Assistant State's Attorneys Knight and King served in the Fitzsimmons administration as well as the Ryan administration. The defendant State's

Attorneys (collectively "State's Attorneys") are sued in both their official and individual capacities. Fitzsimmons, Knight and King all were allegedly involved in pre-indictment stages of the investigation and Ryan, Kilander, Knight and King were involved in the trial and post-trial stages.

The State's Attorneys are variously[2] charged with: (1) conspiring with sheriff's deputies and certain expert witnesses to manufacture bootprint evidence designed to implicate plaintiff; (2) the conduct of coercive interrogation in order to obtain evidence against plaintiff; (3) convening of a special investigative grand jury for the same purpose; (4) bribery of two suspects with reward money and other financial considerations to make false and culpatory statements about plaintiff; (5) the obtaining of indictments from the special investigative grand jury in order to pressure certain defendants into making inculpatory testimony against plaintiff; (6) the generation of false and highly prejudicial publicity; (7) making post-trial inflammatory statements; (8) the manufacture of false and inculpatory statements post-trial; and (9) engagement of a cover up rather than admitting plaintiff was innocent of the murder. Plaintiff contends that these specific acts were done to prejudice and defame plaintiff, to cover up defendants' failure to solve the crime, to cover up the arrest, imprisonment and prosecution of the

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[2] Of the various charges that are set forth immediately following, it would appear that Fitzsimmons, Kilander, Knight and King are charged with numbers (1) through (6) and Ryan, Knight and King are charged with (7) through (9).

wrong man, and to further defendant Fitzsimmons' political career, and in so doing defendants allegedly violated plaintiff's rights to due process and fair trial by causing the jury to deadlock rather than to acquit which in turn caused him to be incarcerated for an additional two years.

The discussion of prosecutorial immunity must start of course with *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, which established that a prosecutor is absolutely immune from a suit for damages under 42 U.S.C. §1983 for alleged violation of constitutional rights committed in "initiating a prosecution and in presenting the state's case." The court distinguished those functions "imminently associated with the judicial phase of the criminal process" from those which were more closely associated with investigative "police work" or administrative duties, the latter being subject to only qualified immunity. The court recognized that prosecutors were advocates for the state and therefore should not have to defend prosecutorial mistakes. The immunity was held not to depend upon the defendant's status as a prosecutor but upon the "functional nature of the activities of which a plaintiff complains." *Id.*, 430, 96 S.Ct. at 994. Improper motivation such as malice, vindictiveness or self interest are irrelevant in assessing immunity, as are allegations of abusive, illegal or unethical conduct. *Id.*

Because *Imbler* involved post-indictment activities the question of whether the evidence-analyzing and case preparation functions performed by a prosecutor before the actual filing of an information or indictment or before a grand jury constituted prosecutorial or investigative functions was left open. *Imbler*, 424 U.S. at 431 n.33, 96

S.Ct. at 995 n.33. Circuit courts have, subsequent to *Imbler*, declined to establish a bright line commencement of proceedings test and have applied absolute immunity to many acts of prosecutors that have occurred prior to indictment. *See* e.g., *Barbera v. Smith*, 836 F.2d 96, 100 (2nd Cir. 1987); *Powers v. Coe*, 728 F.2d 97, 104 (2nd Cir. 1983). The Second Circuit has divided pre-litigation functions into at least two categories: first, the supervision of and interaction with law enforcement agencies in acquiring evidence which might be used in a prosecution, and second, the organization, evaluation and marshaling of this evidence into a form that will enable the prosecutor to decide whether to seek a warrant, indictment, or go to trial. The former was believed to be of a police nature and the latter prosecutorial. *Barbera v. Smith*, 836 F.2d at 100.

Other acts held to be encompassed within the protected prosecutorial function which occurred prior to indictment include instituting the termination of parental rights even if allegedly without notice, *Martin v. Aubuchon*, 623 F.2d 1282, 1285 (8th Cir. 1980); procuring a warrant for the arrest of a charged defendant, *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983), and in advocating a particular level of bail, *id.* at 438, 439; activities in the plea bargaining context despite misrepresentation, *Taylor v. Kavanaugh*, 640 F.2d 450, 453 (2nd Cir. 1981); intimidating plaintiff in dismissing a damage suit in exchange for dismissing of criminal charges, *McGruder v. Necaise*, 733 F.2d 1146, 1148 (5th Cir. 1984); providing advice to law enforcement officials concerning the existence of probable cause and the legality of arrests, *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987).

Pre-indictment interrogation of witnesses or securing of evidence by other means, when performed by a prosecutor, has been recognized in a variety of circumstances as being inherent in the decision whether to initiate a prosecution or as pre-trial preparation and thus qualify for absolute immunity. *Myers* at p.1449; *Forsyth v. Kleindienst*, 599 F.2d 1203 (3rd Cir. 1979), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3147 (1981); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810 (1985) (conferring with potential witnesses for the purpose of deciding whether to file a charge); *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir. 1980), *cert. denied*, 449 U.S. 861, 101 S.Ct. 165 (1980) (coercion of false testimony leading to indictment, the reasoning being that the same injurious result from the decision to prosecute must flow from the initiation of criminal proceedings); *Atkins v. Lanning*, 556 F.2d 485 (10th Cir. 1977) (investigative case preparation can be regarded as an integral component of case presentation); *Demery v. Kupperman*, 735 F.2d at 1144 ("conferring with potential witnesses regarding their knowledge of underlying events is plainly part of a prosecutor's preparation of his case" and therefore immune); *Cook v. Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980) (interviewing witnesses before presenting their testimony to a grand jury).

On the other hand, it has been held that when a prosecutor participates in ferreting out crime and is called upon to make the decisions similar to those that a policeman makes, he is functioning in an analogous role to that of a policeman. Accordingly, he is entitled to only the qualified immunity which the Supreme Court has determined to be sufficient to preserve the ability of

police officers to function effectively. See *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1966). Thus when a prosecutor participates in a search and seizure mission he has been held to be entitled to only qualified immunity. *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *see* also *Marrero v. Hialeah*, 625 F.2d 499 (5th Cir. 1980). Failure of an investigative prosecutor to provide witness protection to a cooperating individual in the course of a fraud investigation only entitled the prosecutor to qualified immunity when the government had not yet engaged in the process of prosecuting a criminal defendant. The record revealed that complained-of acts occurred a full five months before an arrest warrant was issued and six months before an indictment was returned. *Barbara v. Smith, supra.* Participation in an illegal search and seizure only entitled a prosecutor to qualified immunity. *McSurely v. McClellan*, 697 F.2d at 319-20. Sending a defamatory letter to the legislature after all criminal proceedings had terminated was considered administrative and only entitled to qualified immunity *Walker v. Cahalan*, 542 F.2d at 684-85.

We now turn to an analysis of plaintiff's allegations against the State's Attorneys within this legal framework.

A. Bootprint Evidence

According to the complaint, in the early stages of the investigation a bootprint was discovered on the door of the Nicarico home which the sheriff's detectives concluded was left by the killer. At approximately the same time the police were informed by one Hernandez that plaintiff was present for a post-murder conversation in which the murder was discussed. Plaintiff voluntarily

produced his boots for a comparison examination by the DuPage County Crime Lab which concluded that they did not match the bootprint. This conclusion was communicated to defendants Fitzsimmons, Knight and King. The Sheriff then sent the boots to the Illinois Department of Law Enforcement Crime Lab for examination where it was concluded that plaintiff's boot could have made the footprint. This report was shared with the State's Attorney. Knight and Fitzsimmons and various other defendants contacted defendant Olsen of the Kansas Bureau of Identification Crime Lab and anthropologist Robbins to conduct additional testing. Olsen concluded that although the boot and bootprint had similar class characteristics they were insufficient to allow a positive identification. Defendant Robbins however was able to make a "positive identification." Robbins, according to the complaint, was reviewed in the forensic community with great skepticism which the defendants "knew or should have known."

It appears therefore from this recitation of allegations that at the time of these activities complained of plaintiff had been connected to the crime scene by Hernandez independently of the boot evidence so that the purpose of the development of the boot evidence was to corroborate the information supplied by Hernandez, who is described in the complaint as being "a mentally disturbed and totally incredible person."[3]

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[3] If it was "obvious" there would be all the more reason to seek corroboration.

The question is whether under these circumstances the efforts by the State's Attorneys to obtain definitive boot evidence linking plaintiff to the Nicarico murder was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process. *Barbara*, 836 F.2d at 100. Since the bootprint and the boots were obtained prior to involvement by the State's Attorneys, it appears that their work was more in the nature of evaluative rather than acquisitive work. At the particular point they got involved plaintiff had already been fingered by Hernandez. The bootprint and plaintiff's boots had already been obtained by the Sheriff. The securing of expert testimony is not securing evidence but securing opinions as to the value and relevance of existing evidence to see if it could be admissible and evidence in a subsequent proceeding before a grand jury or at trial. Thus the work was more associated with the evaluative judicial phase rather than the acquisitive investigative phase. *Id.* Accordingly, the court finds that the State's Attorneys are entitled to absolute immunity for their involvement with the boot evidence.

B. Special Investigative Grand Jury

The complaint charges that the State's Attorneys convened a special DuPage County "investigative" grand jury solely for the purposes of the Nicarico case. It is charged that it was used as an investigative tool whereby witnesses, including plaintiff, were interrogated, intimidated, and badgered and where only the favorable portions of the boot evidence were admitted, with the

unfavorable portion intentionally withheld. Other incredible, irrelevant, false and contradictory hearsay, and double hearsay, evidence designed to prejudice plaintiff was placed before the grand jury. The State's Attorneys also offered reward money to bribe Hernandez to make further false inculpatory statements to be presented to the grant jury. Indictments were subsequently obtained of plaintiff as well as others, the purpose of which was alleged to be in furtherance of the re-election prospects of State's Attorney Fitzsimmons, who was being challenged by defendant Ryan.

The case law, with one exception cited by plaintiff (*Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089 (1978)), regards as well settled that presentation of evidence to a grand jury falls within the scope of advocatory prosecutorial conduct protected by absolute immunity. As stated in *Gray v. Bell*, 712 F.2d 490 (D.C.Cir. 1983):

> "Participation in grand jury proceedings is a vital and customary part of a prosecutor's duties. At least in those instances where an indictment is returned, it can safely be said that such if not all of a prosecutor's conduct in presenting the evidence to a grand jury will reflect traditional advocacy directed to securing an indictment."

Briggs v. Goodwin, a 1977 decision of the same circuit as *Gray*, is the only case that distinguishes between so-called "investigative" grand juries and "indicting" grand juries. *Briggs* was a Section 1983 claim based upon allegations that a special prosecutor conducting a grand jury investigation of an anti-war organization knowingly gave false

testimony during a hearing on a related motion in district court. The prosecutor had been directed by the court to disclose any government agents or informers among the witnesses subpoenaed before the grand jury. The *Briggs* court held that the prosecutor's actions were more investigative than prosecutorial. The court attached great importance to the fact that the grand jury had been convened to determine whether a crime had been committed, if so, its precise nature, and the identity of individuals to whom criminal liability might attach. *Briggs* is therefore as distinguishable here as it was in *Gray*; where precise crimes had already been identified and certain individuals had been identified as targets.[4] The court finds that the grand jury here was substantially dissimilar to the grand jury in *Briggs* so that whatever precedential value *Briggs* may currently have is irrelevant. *Gray*, 712 F.2d at 503. Therefore absolute immunity attaches to all allegations of prosecutorial misconduct related to the grand jury proceedings.

C. Post-Indictment, Pre-Trial and Trial Activities

The complaint charges that the State's Attorneys, after the indictment was handed down and prior to trial, constructed and shaped the boot evidence and secreted exculpatory boot evidence from plaintiff's defense lawyer until the eve of trial. The complaint further charges the State's Attorneys with presenting the manufactured boot evidence as the cornerstone of their case against plaintiff

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[4] The same circuit that decided *Briggs*, in its later decision in *Gray*, noted that its previous decision in *Briggs* had been met with generally unfavorable comment. *Gray*, 712 F.2d 503 n.38.

as well as the presentation of false and inculpatory statements of plaintiff's co-defendants obtained from coercive interrogations, promises, or rewards and other financial inducements.

It is clear that these allegations of prosecutory misconduct are absolutely privileged under *Imbler v. Pachtman*, 424 U.S. 493, 96 S.Ct. 984 (1974). *Imbler* involved precisely the same types of allegations.

D. Post-Trial Activities

The complaint alleges that plaintiff's original criminal trial ended in a hung jury. The State's Attorneys then proceeded to announce that they planned to continue plaintiff's imprisonment[5] and to retry him. They persisted in this decision to continue his arrest, imprisonment and re-prosecution in spite of the fact that subsequent to the mistrial another individual confessed to the crime and claimed to have acted alone. The prosecution and imprisonment was continued until March of 1987 when all of the charges against plaintiff were dismissed allegedly as the result of the death of Robbins, the prosecution's expert witness who tied the boot evidence to plaintiff.

It is clear that these activities were incurred as a result of the State's Attorneys' decision to retry the plaintiff. The original indictment still stood and the case continued against plaintiff in spite of the mistrial and could only be terminated by order of court. The decision as to

[5] Through an extremely high bond.

when to prosecute is preeminently that of the State's Attorneys and is "at the heart of the holding in *Imbler*", *Grant v. Hollenbach*, 870 F.2d 1135, 1138 (6th Cir. 1989). Accordingly, the State's Attorneys are entitled to absolute immunity for these post-trial activities.

E. Public Statements by the Prosecutors

The complaint alleges that both pre- and post-trial false and misleading statements were made by the State's Attorneys which were designed to prejudice plaintiff and to justify his continued arrest, imprisonment and prosecution. These statements included claims that plaintiff was guilty of raping and killing Nicarico.

Plaintiff argues that *Hampton v. Hanrahan* and *Powers v. Coe* make it clear that public statements by prosecutors are not protected by absolute immunity because they are administrative rather than prosecutorial. Therefore plaintiff claims defendants' publicity campaign which repeatedly and falsely asserted plaintiff's guilt, falsely linked him to a burglary ring, and publicly attempted to discredit the confession of the man who confessed to committing the crime, is not protected by prosecutorial immunity.

While it is true that only qualified immunity is available to shield a prosecutor's public statements in a Section 1983 suit, the conduct to be actionable must amount to a deprivation of a constitutional right. *Powers v. Coe*, 728 F.2d at 105. Violations of state law alone are insufficient to state a claim for Section 1983 relief. Injuries to reputation and emotional distress caused by prosecutorial public statements are violations of state law and do not

implicate the constitution. *Geter v. Fortenberry,* 849 F.2d 1550, 1557 (5th Cir. 1988); *Coen v. Runner,* 854 F.2d 374, 378-79 (10th Cir. 1988).

However plaintiff also charges that these public statements furthered "his false arrest, imprisonment and prosecution." While false arrest and imprisonment which implicate the Fourth Amendment qualify as a basis for a Section 1983 suit, the prosecutors' public statements must be a proximate cause to be actionable. If the State's Attorneys cannot be sued for advice leading to an arrest (*Myers v. Morris, supra*) or indictment (*Lee v. Willins, supra*) or pre-trial detention (*Lerwello v. Joslin, supra*), his public statements justifying these actions could hardly be the basis for arrest, imprisonment or prosecution. If the State's Attorneys are immune for their actions leading to arrest, imprisonment and prosecution even though their motive was improper, their statements and justifications for taking these actions, though perhaps evidence of motive, cannot themselves be actionable because motives are irrelevant in this inquiry. (*Inman,* 424 U.S. at 995 n.34, 96 S. Ct. at 995 n.34)[6]

Thus, the only federal right legitimately implicated stems from plaintiff's claim that some of these statements had the design and effect of unfairly prejudicing him before the jury. It cannot be said at the pleading stage that the alleged pre-trial publicity could not have influenced some of the jurors so as to cause the jury to hang rather

[6] A public statement could cause another person to take an action based on that statement but it is difficult to see how a person's own statement could induce him to act.

than to acquit outright. However only one public statement allegedly made predated the jury trial, *viz,* State's Attorney Fitzsimmons' public announcement of the indictments and his summary of the evidence.[7] While defendants' argument as to why absolute immunity ought attach to such public statements is strong, the federal appellate cases deny absolute immunity to federal prosecutors for statements made at press conferences where a [sic] criminal indictments are announced. *Steepanian v. Addis,* 699 F.2d 1046, 1048 (11th Cir. 1983); *Marrero v. City of Hialeah,* 625 F.2d 499, 505-06 (5th Cir. 1980). Accordingly, all State's Attorneys are entitled to absolute immunity for their public statements except for Fitzsimmons who is not entitled to immunity for his announcement of the indictment.

F. Alleged Cover Up

Plaintiff contends that prosecutors are not immune from liability for actions taken to cover up their inability to solve the crime and the prosecution of the wrong person. Plaintiff cites three cases in support: *Ryland v. Shapiro,* 708 F.2d 967 (5th Cir. 1983); *Bell v. City of Milwaukee,* 514 F.Supp. 1363 (E.D. Wisc. 1981); *Hampton v. Hanrahan,* 600 F.2d 600 (7th Cir. 1979).

In *Ryland* prosecutors falsified a death certificate; in *Bell* in [sic] district attorney participated in a coroner's inquest in an effort to cover up a murder committed by a policeman; and in *Hampton* the prosecutor sought to cover up his part in an illegal raid of an apartment. A

[7] *See Plaintiff's Response* brief, p.11 note**.

common thread in these cases is that the deeds covered up will not themselves be entitled to absolute immunity because they all were committed while the prosecutor was acting outside prosecutorial function. The central point of *Imbler* is that the inquiry turns on this functional nature of the activity rather than the motive of the actor. *Imbler*, 424 U.S. at 419 n.13. Motivation is only relevant to the good faith defense of qualified immunity. Here the deeds allegedly covered up were themselves entitled to absolute immunity. Accordingly, it would make no sense to grant immunity to the acts themselves but to deny it to the cover up. *Jones v. Shanklin*, 800 F.2d 77, 80 (6th Cir. 1986). To hold otherwise would allow an artful pleader to circumvent *Inman* because every time a prosecutor denied improper motive for an immune activity he could be sued for covering up. Accordingly, the State's Attorneys are entitled to absolute immunity for these claims.

G. Plaintiff's Common Law Claim

Plaintiff also pleads pendent state common law causes of action for false imprisonment, malicious prosecution and intentional infliction of emotional distress. The prosecutors claim that they are entitled to absolute immunity for these claims arising out of the same set of operative facts upon which plaintiff bases his Section 1983 claim. The basis of the Supreme Court decision in *Imbler* is that prosecutors enjoy the same absolute immunity for liability under Section 1983 for prosecutorial misconduct as they did under common law as it existed at the time Section 1983 was enacted. *Imbler*, 424 U.S. at 423, 96 S.Ct. at 992, and the cases and material cited at

n.21. The common law immunity is well settled. Accordingly, the State's Attorneys are immune from liability for the pendent state law claims under Counts III, IV, V and VI.

CONCLUSION

The motion of the State's Attorneys to dismiss Count I (Section 1983) is granted as to defendants Ryan, Knight, Kilander and King, and granted as to defendant Fitzsimmons, with the exception of the claim under Count I based upon the claim of denial of constitutional right to a fair trial as a result of the pre-trial public announcements of defendant Fitzsimmons as described in paragraph 44 of the complaint. Counts III, IV, V and VI, as to Fitzsimmons, Ryan, Knight, Kilander and King are dismissed.

II. Motions to Dismiss Filed by German, Olsen and the Estate of Robbins ("expert witnesses")

The expert witnesses are sued by plaintiff under 42 U.S.C. §1983 and for various pendent state common law causes of action arising from plaintiff's arrest, indictment, and subsequent prosecution for the Nicarico murder. The expert witnesses each testified before the grand jury and at plaintiff's trial. Plaintiff claims that they each gave perjured testimony regarding the so-called boot evidence. Plaintiff's complaint also alleges in paragraph 80 that . . . "each defendant reached an understanding, engaged in a sequence of events or joint course of conduct and/or otherwise agreed and conspired together to violate the constitutional rights of plaintiff Buckley with

the mutual purpose, objective and/or knowledge that it would deprive him of said right."

The expert witnesses haved [sic] moved to dismiss contending that they are entitled to absolute immunity on all of these claims because the claims are based on their testimony before the grand and at trial, for which they are entitled to absolute immunity under *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108. In *Briscoe* the Supreme Court held that Section 1983 did not abbrogate [sic] the absolute immunity existing at common law with respect to either private witnesses or witnesses testifying under color of law. Accordingly, the court held that a plaintiff who suffered constitutional injuries as a result of perjured testimony offered at trial could not recover against the perjuror [sic] under Section 1983. In doing so the court analogized the reason for granting witnesses immunity with the reasons for granting immunity to prosecutors. 460 U.S. 343, 103 S.Ct. at 1119. Although left an open question in *Briscoe*, the Seventh Circuit has extended witness immunity to those testifying before a grand jury. *Kincaid v. Eberle*, 712 F.2d 1023 (1983). Common law and Section 1983 immunity however only extends to the witness's testimonial function. The out of court conduct and investigative activities of a potential witness, even though the person later gives testimony in a judicial proceeding, is entitled only to qualified immunity. Otherwise, a police officer or other witness who violates the constitutional rights of another could immunize themself [sic] from these violations solely by appearing in court as a witness. *Jones v. City of Chicago*, 856 F.2d 985, 991, 993 (7th Cir. 1988). In *Jones* a laboratory technician employed by the City of Chicago conducted tests and typed semen

and blood reports but failed to include the information in her laboratory report that she prepared for the criminal proceeding. The court held that the jury was entitled to conclude that the lab technician deliberately withheld the information so that it could not be used in the defense of the plaintiff.

To the contrary here the three defendants examined evidence and prepared reports which were later changed, allegedly falsely, to implicate plaintiff. There are no allegations that the initial investigative work done by any of the experts was false; rather plaintiff alleges that the initial reports were accurate but that the later testimony of the witnesses was changed in order to substantiate a case against plaintiff. Therefore the net effect of these allegations is not that defendants initially falsified their investigations but that they falsified their testimony before the grand jury and at trial. This distinguishes this case from *Jones*: there the initial investigative acts were part of the conspiracy to railroad the plaintiff, Jones. *Jones*, 856 F.2d at 993. Here the testimonial acts of the witnesses were designed to railroad Buckley. This is a crucial distinction which entitles the expert witnesses to immunity.

Plaintiff also argues that a conspiracy including the expert witnesses existed among the defendants to violate the constitutional rights of plaintiff. To be liable as a conspirator a person must be a voluntary participant in a common venture for an illegal purpose. He must understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do his part to further them. *Jones*, 856 F.2d at 992. However in order to support a conspiratorial theory a plaintiff would have to

allege non-privileged actions that would tie the expert witnesses into the conspiracy. *Martin v. Malhoyt*, 830 F.2d 237 (D.C.Cir. 1987). Here the complaint charges that the expert witnesses in their non-testimonial roles gave exculpatory information to the prosecution. This is certainly inconsistent with plaintiff's conspiratorial theory that these witnesses agreed to help inculpate the plaintiff. The misconduct complained of was the perjured testimony intended to inculpate plaintiff but these were entitled to immunity. Accordingly, the conspiratorial actions of the expert witnesses consisted of testimonial acts which are absolutely privileged either in suits directly against the witness or indirectly against the witness through a conspiracy theory. *Martin v. Malhoyt*, 830 F.2d 237, 258 n.57 (D.C.Cir. 1987) citing *Cooper v. O'Connor*, 99 F.2d 135, 142 (D.C.Cir. 1938), *cert. denied*, 305 U.S. 643, 59 S.Ct. 146 (1938).

A contrary holding would open the door to artful pleading of conspiracy in order to circumvent testimonial immunity. There appears to be no substantial justification to treat an agreement to perform an act to which absolute immunity attaches differently from the treatment of the individual act itself. "Accusing the defendants jointly or by way of a count of conspiracy gives plaintiff's case no more virtue than if he had proceeded against each defendant singlely." *Martin v. D.C. Metropolitan Police Dept.*, 812 F.2d 1425, 1429, citing *Cooper v. O'Connor*, F.2d 135, 142 (D.C.Cir. 1938).

Plaintiff's final argument seeks to distinguish a witness who is responsible for the initiation of the criminal proceeding, i.e., a complaining witness from a mere testimonial witness, citing *White v. Frank*, 855 F.2d 956 (2nd

Cir. 1988). While this argument (and *White*) seems to ignore the *Briscoe v. LeHue* principal [sic] that "immunity rests on functional categories [rather than] on the status of the defendant" (460 U.S. at 342), it is difficult to see here how any of the expert witnesses could be characterized as "complaining witnesses." In the prosecution of plaintiff all that the expert witnesses did was to evaluate certain evidence which was presented against plaintiff before the grand jury. The *White* court made this distinction because at common law in an action for malicious prosecution the person who initiated a baseless prosecution was not absolutely immune. *White*, 855 F.2d at 959, quoting *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1096 (1986). A complaining witness however is described as "the party who made the complaint." *White*, 855 F.2d at 959, quoting *Hastings v. Lusk*, 22 Wuend 410, 417 (N.Y. 1839). Here there is no allegation that any of the expert witnesses had anything to do with the initial arrest or the complaint filed against plaintiff; rather the allegations charge the expert witnesses with giving false testimony that led to his indictment and a hung jury. Thus their testimony is privileged under *Briscoe* and *Kincaid*. Accordingly, the motions of the expert witnesses to dismiss all counts of the complaint directed against them are granted.

III. Motion of the County of DuPage to Dismiss

Plaintiff's *Monell* policy claim against the County of DuPage is based on the actions of the Sheriff of DuPage County and the State's Attorney of DuPage County as county policymakers. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

A. Sheriff of DuPage County

The County of DuPage argues that the Supreme Court in *Pembaur* did not decide that the sheriff and the county prosecutor are final policymakers of the county *per se*, but, in deference to the interpretation and application of Ohio state law by the Sixth Circuit Court of Appeals, the elected officials were final policymakers as far as Hamilton County, Ohio was concerned. The Sixth Circuit considered relevant to its analysis that under Ohio law the sheriff is elected by the residents of the county; he serves as the chief law enforcement officer of the county; he submits his budget requests to the county board which in turn furnishes his office, books, furniture and other materials; his salary and all training expenses are paid out of the county general fund; and he is responsible for the neglect of duty or conduct of his deputies. It concluded that the sheriff's duties enumerated in the Ohio statutes clearly indicated that the sheriff could establish county policy in certain areas. *Pembaur v. City of Cincinnati*, 746 F.2d 337, 341 (6th Cir. 1984).

Employing a similar analysis of Illinois law shows that the sheriff is similarly treated. In Illinois the sheriff is described in the Constitution as a "county officer" and is located in the Local Government Article. S.H.A. Const. Art.7, §4. He is elected by the voters of the county. *Id.*, §4(a). His duties, powers and functions are provided by law and by county ordinance, as well as the duties, powers or functions derived from common law or historical precedent unless altered by law or county ordinance. *Id.*, §4(d). His salary and operating expenses are set by a county appropriation ordinance and are paid from the county treasury. Ill.Rev.Stat., ch.125, §14e. The sheriff may

appoint deputies not to exceed the number allowed by the county board, Ill.Rev.Stat., ch.125, §7. The sheriff is liable for any neglect or admission of the duties performed by his deputies, Ill.Rev.Stat., ch.125, §13. All expenditures of the sheriff's office including the purchase of equipment are subject to the county appropriation ordinance. The sheriff must maintain an office in the county seat, the hours of which may be fixed and determined by the county board, Ill.Rev.Stat., ch.125, §15. The sheriff shall be the conservator of the peace in his county, Ill.Rev.Stat., ch. 125, §17.

Comparing Illinois law and Ohio law shows that a sheriff in Illinois is as much a county officer as the Sheriff of Hamilton County, Ohio. He therefore is just as able to establish the official position of his County Board as the Sheriff of Hamilton County, Ohio was his. Therefore the court finds that the Sheriff of DuPage County is a final policymaker for DuPage County under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). The cases cited by defendant, *Thomas v. Talesky*, 554 F.Supp. 1377, 1379 (N.D.Ill. 1983) and *Baltz v. County of Will*, 609 F.Supp. 992, 995 (N.D.Ill. 1985), were all decided before *Pembaur* and therefore inapplicable.

B. State's Attorney

State's Attorneys on the other hand are provided for in the Judicial article of the Illinois Constitution S.H.A. Const. Art. 6, §19.[8] A State's Attorney's duties are provided in Ill.Rev.Stat., ch.14., §1. Section 1 provides that

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[8] The Sixth Circuit did not make a statutory analysis for the office of prosecutor of Hamilton County as it did for the Sheriff

the State's Attorney before entering upon the duties of his office "shall . . . be commissioned by the Governor." He also shall execute a bond to the People of the State of Illinois to be approved by the circuit court of his county and is to be filed with the Secretary of State and shall be to the benefit of the state, county, corporation or person injured by any breach. (*Id.*) Section 1.1 establishes the date of the commencement of his duties. Section 5 provides for the duties of the State's Attorney which include, *inter alia*, "to commence and prosecute all actions, suits, indictments and prosecution civil and criminal, in the circuit court for his county in which the people of the state or county may be concerned." Section 5(a) provides that the State's Attorney shall control the internal operations of his office and procure the necessary equipment, materials and services to perform the duties of his office. Furthermore, Illinois courts have held that the office of the State's Attorney is part of the Executive Branch of state government and its powers are executive powers. *People v. Thompson*, 43 Ill.Dec.600, 410 N.E.2d 600 (4th Dist. 1980); *People v. Stinger*, 317 N.E.2d 340, 342 (2nd Dist. 1974).

It seems clear therefore that the office of State's Attorney is distinguishable from the office of Sheriff with the former being a state officer and the latter being a county officer. This is particularly clear where as here the State's Attorney is prosecuting an individual, in the name of the People, for allegedly violating the State Criminal

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of Hamilton County. According to the court there appeared to be no dispute that the prosecutor established county policy. *Pembaur*, 746 F.2d at 341 n.3.

Code. *Jones v. City of Chicago*, 639 F.Supp 146 (N.D.Ill. 1986); *Stokes v. City of Chicago*, 660 F.Supp. 1459 (N.D.Ill. 1987). The court therefore finds tht [sic] the State's Attorney is not a policymaker for his county. Accordingly, the motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

CONCLUSION

The complaint is dismissed against defendants Ryan, Knight, Kilander, King, German, Olsen and Robbins and denied as to defendants Fitzsimmons and the County of DuPage.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
HARRY D. LEINENWEBER, Judge
United States District Court

DATED: JUN 9 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Caption Omitted In Printing)

AGREED ORDER DIRECTING ENTRY OF FINAL JUDGMENT PURSUANT TO FED.R.CIV.P. 54(b)

This matter coming before the Court pursuant to the parties' joint motion for the entry of a final judgment on this Court's Memorandum Opinion and Order of June 9, 1989, granting in part and denying in part the Defendants' Motion to Dismiss. In granting said motion, this Court makes the following findings:

1. This civil rights case arose from the Plaintiff's arrest, prosecution and imprisonment for the murder of eleven year old Jeanine Nicarico in 1983. The case was brought against (1) the County of DuPage, (2) the current State's Attorney of DuPage County, James Ryan, his predecessor, Michael Fitzsimmons, and several current and former Assistant DuPage County State's Attorneys (State's Attorney Defendants); (3) DuPage County Sheriff Richard Doria and several Sheriff's Deputies (Sheriff's Department Defendants); and, (4) two expert witnesses and the Estate of a deceased expert witness (expert witness Defendants), all who testified during Plaintiff's prosecution.

2. All Sheriff's Department Defendants have answered the complaint and asserted an affirmative defense of qualified immunity.

3. The County, the State's Attorney Defendants and the expert witness Defendants filed Motions to Dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6).

The State's Attorneys' Motion was premised primarily on grounds of absolute prosecutorial immunity. The expert witness' Motion was premised primarily on absolute witness immunity. The County of DuPage's Motion argued that it could not be held liable for acts perpetrated by members of either the DuPage County State's Attorney's Office or the DuPage County Sheriff's Department.

4. On June 9, 1989, this Court entered a Memorandum Opinion and Order denying in part and granting in part the Defendants' Motions:

(A) The Court granted the expert witness' Motion to Dismiss.

(B) The Motion to Dismiss the State's Attorneys was granted as to all State's Attorney Defendants, except for former DuPage County State's Attorney Michael Fitzsimmons. In this Court's opinion, absolute immunity is not available to Fitzsimmons on Plaintiff's claims that he was denied a fair trial because of prejudicial pretrial public statements made by Fitzsimmons in connection with the announcement of Plaintiff's indictment.

(C) The County of DuPage's Motion was granted as to its' contention that it should not be held liable under *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), for actions of any members of the DuPage County State's Attorney's Office. However, the Motion was denied insofar as this Court determined that the County could be held liable under *Monell* for acts of members of the Sheriff's Department.

5. On July 10, 1989, Defendant Michael Fitzsimmons filed a Notice of Appeal to the Seventh Circuit Court of Appeals from this Court's determination that he was not entitled to absolute immunity for making prejudicial pre-trial statements. That appeal was taken as a matter of right pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

6. This Court therefore finds, pursuant to Fed.R.Civ.P. 54(b), that its order of June 9, 1989, disposed of more than one but fewer than all of the claims and parties, and further expressly finds that there is no just reason for delay, particularly since a portion of this order is already being appealed as a matter of right by the Defendants.

7. Accordingly, this Court hereby directs the Clerk to enter final judgment pursuant to Fed.R.Civ.P. 54(b) as to the entirety of its order of June 9, 1989.

/s/ Leinenweber
JUDGE LEINENWEBER

DATED August 8, 1989

APPROVED AS TO FORM & SUBSTANCE:

/s/ James G. Sotos
JAMES G. SOTOS,
One of the Attorneys
for the Defendants

/s/ G. Flint Taylor
G. FLINT TAYLOR,
One of the Attorneys
for the Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

Stephen Buckley	JUDGMENT IN A CIVIL CASE
V.	CASE NUMBER:
County of DuPage et al	88 C 1939
	(Docketed Aug 10, 1989)

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered pursuant to Fed.

R.Civ.P. 54(b) as to the entirety of this Court's order of June 9, 1989 stating on counts I, III, IV, V and VI of plaintiff's complaint are dismissed as to defendants Ryan, Knight, Kilander, King and Fitzsimmons on motion of defendants. Further, plaintiff's complaint is dismissed as to the expert witnesses on motions of the expert witnesses. The motion to dismiss by the County of DuPage is denied insofar as the complaint pleads a cause of action based upon the actions of the Sheriff of DuPage County, and is granted insofar as the complaint pleads a cause of action based upon the actions of the State's Attorneys of DuPage County.

August 9, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ Illegible
(By) Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2441, 89-2899, and 89-2900

STEPHEN BUCKLEY,

Plaintiff-Appellee – Cross-Appellant,

v.

J. MICHAEL FITZSIMMONS, *et al.*,

Defendants-Appellants – Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 1939 – **Harry D. Leinenweber,** *Judge.*

ARGUED SEPTEMBER 27, 1990 –
DECIDED DECEMBER 5, 1990

Before WOOD, JR., and EASTERBROOK, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

EASTERBROOK, Circuit Judge. Probable cause is enough to initiate a criminal prosecution. It takes proof beyond a reasonable doubt to convict. That difference, together with uncertainties in what the evidence will show, implies that some innocent persons will be prosecuted. Trial is supposed to filter out the innocent, a task it serves well if imperfectly.

Accusation and trial are wrenching experiences, especially for the innocent. On top of trauma come expense and often the loss of freedom pending disposition. How should society respond when an innocent person is prosecuted? Apologies are mild balm at best. Money is more effective. Compensation not only would aid the involuntary participant in the criminal justice system but also would induce prosecutors to evaluate cases more carefully, taking account of the costs to the defendants. Yet prosecutors rarely apologize, and states do not compensate defendants acquitted by the jury, or against whom charges are dropped. Often neither apology nor compensation is in order, because the suspect is guilty but for one reason or another is not convicted. Sometimes both are called for, but they are almost never forthcoming.

Innocent defendants, rightly feeling put upon, may respond to this governmental indifference by turning on their accusers, making them defendants in turn. They demand that the prosecutors, police, and witnesses dig into their own pockets to provide recompense. If courts could quickly and reliably identify malicious prosecutions, those in which the case was manufactured or conviction unattainable, it might make sense to award damages, to cause prosecutors with the power to destroy others' lives to do their jobs with the care that their responsibilities require. But the legal system is neither quick nor infallible. To allow a search for malicious or weak prosecutions is to license litigation at any defendant's option. And if malicious prosecutions are rare, then even a low rate of error in suits against prosecutors will lead to more false positives than to vindication of

just claims. Given the error inevitable in our legal system – in criminal prosecutions as well as in follow-on civil litigation – a system of personal liability for prosecutors and witnesses would do more to discourage the activity of criminal prosecution (or testifying) than to make the prosecutors and witnesses more careful and honest. Because criminal prosecutions regularly do more good than bad, and because prosecutors have no way to use these social benefits to offset the damages they could be called on to pay when their activities injure the innocent, courts have concluded that both prosecutors and witnesses generally are immune from damages on account of errors. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Briscoe v. LaHue*, 460 U.S. 325 (1983).

How far does this immunity extend? Does it cover the process of investigating and evaluating a case as well as the trial itself? If so, it could throw a blanket of immunity over acts that may lead to liability when performed by police, see *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988); *Smith v. Springer*, 859 F.2d 31 (7th Cir. 1988), decision after remand under the name *Smith v. Chicago*, 913 F.2d 469 (7th Cir. 1990). If not, criminal defendants can evade the immunity established by *Imbler* by asserting that, before the trial began, the prosecutors prepared to do precisely what they did. That would create the same risk of error, and exposure to retaliatory counterstrikes, that *Imbler* and *Briscoe* are meant to avert. We must decide how far immunity doctrines extend in a world in which the most logical option, governmental liability, may well be closed by *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

I.

Jeanine Nicarico, 10 years old, was home with the flu on Friday, February 25, 1983. Her mother Patricia, a teacher, came home to fix lunch for Jeanine, then returned to school. Not long after that someone kicked in the front door to the Nicarico home, trussed Jeanine up in bedclothes, and carried her off. Marks on the walls and door jamb bore mute witness to her efforts to resist. The intruder took no valuables – nothing other than the blanket and its occupant. *People v. Hernandez*, 121 Ill. 2d 293, 521 N.E.2d 25, 26-27 (1988).

The kidnapper drove Jeanine into the country and pulled her nightgown over her head. Unsuccessful in a determined attempt to penetrate her vagina, the kidnapper raped Jeanine in the anus. Now he became her assassin. He caved in her skull with five blows from a tire iron or baseball bat and threw her into the mud 45 feet off the Illinois Prairie Path, a hiking trail. Jeanine died within four hours of the time she ate lunch with her mother. The police found the body on February 27, and the manhunt began.

John Sam, the detective with the DuPage County Sheriff's Police leading the investigation, concentrated on the principal clue the intruder left behind: a clear print (the "bootprint") of the sole of a shoe appeared on the Nicaricos' door. While other detectives interviewed neighbors and persons who might have seen the kidnapper drop Jeanine's body near the trail, Sam tried to find the owner of the shoe. A $10,000 reward attracted Alex Hernandez, a petty thief with low intelligence and a

desire to become a police officer. Hernandez said that he overheard a conversation between Stephen Buckley and "Ricky" in which "Ricky" talked about the crime. Sam tracked down Buckley, an unemployed high school dropout. Buckley admitted having shoes with soles like those in the bootprint on the door. He brought them to Sam for analysis.

John Gorayczyk, the head of the identification section in the DuPage County crime laboratory, decided that Buckley's shoes did not match the bootprint: the soles were the same, but the heels were a little different. Edward R. German, a forensic scientist in the Illinois state crime laboratory, was only a little more positive: he concluded that Buckley's shoe "could have at best" made the print. Prosecutors then sent the shoe to Robert Olsen, with the Kansas Bureau of Identification, who concluded that Buckley's shoe "probably" matched the marks on the door. Prosecutors also brought in Louise Robbins, a professor of anthropology at the University of North Carolina at Greensboro. Robbins, who later testified that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes, concluded that Buckley positively made the marks on the Nicaricos' door.

Meanwhile the investigation was proceeding on other fronts. Two witnesses – one near the Nicaricos' house, another near the Prairie Path – identified Buckley as the driver of a green Ford Granada, missing a hubcap, that left the neighborhood and arrived at the Prairie Path at the right times. These witnesses were positive, even though their earlier descriptions did not match Buckley's features. (One of them initially told police that the driver,

in his late 20s or early 30s, wore granny glasses and was clean shaven; Buckley, 20, had a mustache and does not wear glasses.) Hernandez said that he took some role in Jeanine's abduction and implicated Rolando Cruz, who also confessed (although neither to the rape nor to the murder); both said that Buckley drove the car. Neither Cruz nor Hernandez both of whom have substantially below average intelligence could give important details of the offense, but some circumstantial evidence implicated each.

John Sam arrested Buckley, Cruz, and Hernandez, and they were put on trial for their lives. But Sam began to question the conclusion that the three did it – partly because of discrepancies in the identifications and other details (witnesses reported only a single person in the car); partly because none of the three had a record of sex offenses; partly because Cruz and Hernandez contended that they came to burgle the Nicarico house and took some items, though nothing was missing; but mostly because he was convinced that men who violate little girls do not work in teams. Sex crimes he had solved were solitary aggressions. Sam told his superiors they had the wrong defendants. When they would not listen, Sam quit the force and offered to testify for the defense. James Tuohy, *The DuPage Cover-Up*, Chicago Lawyer 1, 9-14 (May 1986).

A jury convicted Cruz and Hernandez of murder, among other crimes, and the judge sentenced both to death. It was unable to reach a verdict about Buckley, and the prosecutor scheduled a second trial. While prosecution and defense were preparing for retrial, police in LaSalle County arrested Brian Dugan for the abduction,

molestation, and murder of 7 year old Melissa Ackerman. Discussing the charges with his lawyer, Dugan admitted two other rape-murders: Donna Schnorr and Jeanine Nicarico. He furnished details for each, many of which had never been publicized. He also told his lawyer that after killing Jeanine he threw away the shoes he wore. Soles of the shoe style Dugan says he bought at a Fayva store matched the bootprint at least as closely as Buckley's, probably better. A farmer in the area where Jeanine's body was found recalls plowing up a pair of boots in 1983.

Dugan, 29, had a history of violent sex offenses, always solitary. His lawyer used the admissions and a willingness to plead guilty to all three crimes to avoid the death penalty. Dugan would give no statement creating a risk of capital punishment. LaSalle County made the deal, and Dugan is in jail for life on account of the Schnorr and Ackerman slayings. But prosecutors in DuPage County refused to accept Dugan's offer, concluding that his admissions were unreliable. Although Dugan furnished many details that checked out, he also claimed that Jeanine was so well bound that she did not grab anything as they left; the walls of the Nicarico house testified to the contrary.

As DuPage County was preparing to put Buckley on trial a second time, Louise Robbins died. No one else was willing to testify that the bootprint inexorably showed Buckley's guilt. James Ryan, State's Attorney for DuPage County, dismissed the charges against Buckley. He was released in March 1987 after three years in prison; he had been unable to post the $3 million bond. In January 1988 the Supreme Court of Illinois reversed the convictions of

Cruz and Hernandez on the basis of *Bruton* violations at trial: the prosecutor introduced each man's confession implicating the other, and the substitution of euphemisms for names did nothing to hide the accusations from the jury, the court held. *Hernandez*, 521 N.E.2d at 32-37; *People v. Cruz*, 121 Ill. 2d 321, 521 N.E.2d 18 (1988). See also *Cruz v. New York*, 481 U.S. 186 (1987) (rejecting the interlocking confessions exception to *Bruton*). The court did not forbid retrial, concluding that the evidence is sufficient to allow a jury to find guilt. Cruz and Hernandez were retried. Cruz was convicted and has again been sentenced to death. Hernandez's case was mistried because the jury could not agree; Ryan has announced that he will take Hernandez to trial a third time.

Buckley filed this suit under 42 U.S.C. §1983 in 1988. He contends that almost everyone connected with the investigation and prosecution violated his constitutional rights and should be made to pay damages. J. Michael Fitzsimmons, State's Attorney for DuPage County at the time of Buckley's indictment, is the lead defendant. Ryan is among the other defendants, who include the Sheriff of DuPage County, many members of the Sheriff's police, many prosecutors on the State's Attorney's staff, three experts who analyzed the bootprint (German, Olsen, and Robbins), and DuPage County itself.

Everyone who had anything to do with this prosecution, other than Sam and Gorayczyk, has a place in Buckley's rogues' gallery. His complaint contends that all participated in a conspiracy to execute him, although all knew that he is innocent. The ringleader, as Buckley sees things, is Fitzsimmons, who wanted to solve the Nicarico murder to boost his popularity. State's Attorney since

1976, Fitzsimmons was running against Ryan in the Republican primary in spring 1984. To give his campaign a boost, the complaint alleges, Fitzsimmons convened a special grand jury and instructed his assistants to produce an indictment. Buckley narrates a tale of coercive interrogations in 1983 and 1984 by police and prosecutors, arm-twisting of experts that led them to "find" similarities between his shoes and the bootprint, misleading presentations to the grand jury, indictment, and stubborn refusal to dismiss the case despite Dugan's confession. Fitzsimmons announced the indictment at a press conference on March 9, 1984; Buckley maintains that this also violated his rights by turning the community against him, reducing the chance that he could obtain bail or a fair trial. The complaint is full of particulars; we take them as gospel, but the usual caveat applies.

Most of the defendants moved to dismiss the complaint on grounds of immunity, absolute or qualified. DuPage County moved to dismiss on the ground that §1983 does not establish vicarious liability, see *Monell*, 436 U.S. at 691-95, and that neither the Sheriff nor the State's Attorney made "policy" for the County, so it could not be liable directly. Th district judge delivered a split decision. 1989 U.S. Dist. LEXIS 6689 (N.D. Ill.). Ryan and all of the assistant prosecutors prevailed under *Imbler*; the judge concluded that convening the grand jury, presenting information to it, preparing the case (including the expert witnesses), and even interviewing Buckley are covered by absolute immunity. The three expert witnesses received absolute immunity under *Briscoe* and *Kincaid v. Eberle*, 712 F.2d 1023 (7th Cir. 1983), for their out-of-court preparation as well as for their testimony. Fitzsimmons

prevailed on all claims but one: the judge concluded that his announcement of the indictment to the press was not covered by absolute immunity. DuPage County, however, lost. Although the court concluded that state's attorneys are state rather than local officials, so that Fitzsimmons and Ryan were not policy-makers for the county, it concluded that the sheriffs are final policymakers for their counties. Acts of the Sheriff therefore could be the basis of liability for DuPage County, *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), and the court retained the county in the case.

At this point the county, Fitzsimmons, the Sheriff, and members of the Sheriff's police remained as defendants. It was time to start discovery. Instead, almost everyone appealed. Naturally the first question is appellate jurisdiction.

II.

Fitzsimmons' appeal from the order refusing to accord him absolute immunity is within our jurisdiction on the authority of *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), which holds that the denial of a substantial claim of absolute immunity is immediately appealable under 28 U.S.C. §1291. Jurisdiction over the other appeals depends on Fed. R. Civ. P. 54(b), which allows the court to enter final judgment on particular claims or parties. At all parties' request, the district judge entered a judgment designed to allow appeals to be taken under Rule 54(b). More than a year after entering the orders, and after oral argument in this court the district judge also certified a

question for interlocutory appeal under 28 U.S.C. §1292(b). We start with Rule 54(b).

Rule 54(b) does not allow a judge to certify for interlocutory decision issues such as "Is a sheriff a policymaker for counties in Illinois?" When an issue is unresolved and interlocutory resolution could materially advance the termination of the litigation, §1292(b) allows the district judge to certify the question. The court of appeals decides whether to entertain the appeal. Rule 54(b) serves a different function: carving out of a complex case individual claims that have been finally resolved. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437-38 (1956). rule 54(b) allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" but does not change the ordinary meaning of "final". So it does not authorize appeal of decisions that, if made in stand-alone litigation, would not be "final". *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Horn v. Transcon Lines, Inc.*, 898 F.2d 589 (7th Cir. 1990). Unless the court enters final judgment on an entire "claim", or wraps up the case with respect to all claims involving a particular party, Rule 54(b) does not permit an immediate appeal. E.g., *Steve's Homemade Ice Cream, Inc. v. Steward*, 907 F.2d 364 (2d Cir. 1990); *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986); *Horn*, 898 F.2d at 593-95.

The district judge entered judgment in favor of Ryan, the assistant prosecutors, and the three expert witnesses. Buckley's appeal puts all of these before us. Fitzsimmons and DuPage County, however, continue to be parties in the district court. Demands against them may be brought here only if the district judge has finally determined

entire "claims" for relief. DuPage County moved for dismissal on the ground that neither the State's Attorney nor the Sheriff set policy for the county. That motion was denied. The court knocked out one of Buckley's theories but refused to dismiss the claim. Further proceedings lay in store. The denial of a motion to dismiss (or for summary judgment) is not a "final" decision. More than two weeks after oral argument DuPage County moved to dismiss its appeal, agreeing with Buckley's argument, first made in his brief on the merits, that the court lacks jurisdiction; that motion is granted.

Jurisdiction over Buckley's appeal against Fitzsimmons and DuPage County depends on the meaning of "claim" in Rule 54(b). We understand a "claim" for purposes of Rule 54(b) to mean factually or legally connected elements of a case. *Horn*, 898 F.2d at 592. "It has seemed to us implicit in the rule that the retained and the appealed claims must be factually distinct, for otherwise the court of appeals may be forced to analyze the same facts in successive appeals, a form of piecemeal appealing not authorized by the rule." *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1366 (7th Cir. 1990). The claim against Fitzsimmons remaining in the district court is factually related to the claims on which he prevailed; indeed, Buckley alleges that the announcement of the indictment and Fitzsimmons' other acts are all part of a single plan. Similarly, the claim that DuPage County set a "policy" through the decisions of the two states' attorneys is factually related to the claim that it set a policy by the decisions of the Sheriff. Buckley alleges one conspiracy, one policy, one injury.

Olympia Hotels expresses unease with the circuit's definition of a "claim", recognizing that judicial resources may be conserved rather than squandered by accelerating decision on a controlling issue, even if there is a chance that related questions could recur. Of course one cannot go too far with this recognition: jurisdiction is a question of judicial power, not of convenience. When immediate review could materially advance the termination of the litigation, §1292(b) supplies the route but allows the court of appeals to exercise discretion, a filter missing in appeals under Rule 54(b). The rule does not allow the entry of judgments that would not be "final" within the meaning of §1291, see *Horn*, 898 F.2d at 593-94, and a decision foreclosing one theory of liability while leaving others open is not "final" on any understanding of that term.

Still, how much factual overlap is too much is a question of degree, and *Olympia* properly observed that Rule 54(b) commits the decision on such matters to the informed discretion of the district judge. 908 F.2d at 1367-68. Such discretion, thoughtfully exercised, will rarely be disturbed. Unfortunately, nothing in this record suggests that the district judge has "assess[ed] the desirability of immediate judgment and unequivocally give[n] an affirmative answer." *Local P-171 v. Thompson Farms Co.*, 642 F.2d 1065, 1073 (7th Cir. 1981). After Fitzsimmons took an appeal from the denial of his motion to dismiss, the parties presented the district judge with an "agreed order directing entry of final judgment". The judge signed this order. What the parties prepared for the judge contains no discussion of the relation between the claims finally disposed of and those remaining for decision, no

appreciation of the potential for successive decision and weighing the benefits of immediate resolution against the cost to the judicial system. For all we can see, the district judge gave no consideration to systemic interests in preserving the norm of one appeal per case – and of minimizing the number of appeals if there must be more than one. Indeed, nothing suggests that the judge recognized that he was entering a "final judgment" *denying* a motion to dismiss! We have remarked before that district judges may not reflexively enter Rule 54(b) judgments just because the parties want to appeal. *Horn*, 898 F.2d at 592; see also *Glidden v. Chromalloy American Corp.*, 808 F.2d 621, 624 (7th Cir. 1986).

According to the complaint there was a single conspiracy in which the Sheriff and both State's Attorneys participated, producing a "policy" of prosecuting the innocent. Whether adopted through the Sheriff or the State's Attorneys, this single "policy" is the basis of the claim. No matter what we would say about the State's Attorney's role as a policymaker for counties in Illinois, the same set of facts would come back later concerning the Sheriff's role; legal issues also would be similar. Because governmental bodies are not entitled to official immunity, *Owen v. Independence*, 445 U.S. 622 (1980), the questions about DuPage County are unrelated to the immunity issues presented in the appeals properly before us. Buckley's "claim" against the county therefore has yet to yield a "final" decision appealable under Rule 54(b). We dismiss Buckley's appeal to the extent it asks us to decide whether DuPage County may be liable on account of the State's Attorneys' decisions.

Buckley's appeal against Fitzsimmons encounters the same problem. Although the court concluded that Fitzsimmons has absolute immunity from liability on account of most of the incidents about which Buckley protests, it did not dismiss the claim or grant summary judgment in Fitzsimmons's favor. That is why Fitzsimmons is appealing, as he is entitled to do even though the decision is interlocutory. Buckley may appeal, though, only if the decision is "final" within the meaning of Rule 54(b), and it is not.

Is this inconsistent? Fitzsimmons's appeal depends on a conclusion that the decision denying his motion to dismiss is "final" within the meaning of 28 U.S.C. §1291. "Finality" means the same thing under §1291 and Rule 54(b), see *Horn*, 898 F.2d at 593-94, for the rules do not enlarge jurisdiction. See Fed. R. Civ. P. 82; Fed. R. App. P. 1(b). What is "final" about the decision, though is only the conclusion that the case must proceed. Fitzsimmons lost his "right not to be tried" and to avoid discovery, ingredients of immunity separate from an entitlement to prevail on the merits. *Mitchell v. Forsyth*, 472 U.S. 511, 524-29 (1985); *Helstoski v. Meanor*, 442 U.S. 500 (1979). Finality of this kind is a one-way street; only the holder of the "right not to be tried" may appeal, because only he experiences a "final" decision.

Perhaps Buckley could invoke pendent appellate jurisdiction. That concept sometimes allows a court to consider extra issues in an interlocutory appeal. *Illinois ex rel. Hartigan v. Peters*, 861 F.2d 164 (7th Cir. 1988); *Patterson v. Portch*, 853 F.2d 1399 (7th Cir. 1988). We could assume jurisdiction of Buckley's appeal against Fitzsimmons only if the doctrine allows the addition of *appellants*

as well as *issues*. Just as pendent-party jurisdiction in the district court is harder to support than is the addition of issues, *Finley v. United States*, 109 S. Ct. 2003 (1989), so pendent-party appellate jurisdiction is especially problematic. *Abney v. United States*, 431 U.S. 651, 662-63 (1977), tells us not to allow interlocutory appeals to acquire barnacles. Although *Abney* is a double jeopardy case, it is the foundation for the entitlement to immediate appeal when the defendant asserts a right not to be tried. Its flat conclusion that each issue, and presumably each party, must find a separate basis of appellate jurisdiction governs in other cases of the same stripe. We therefore dismiss Buckley's appeal to the extent he seeks relief against Fitzsimmons.

What remains is the belated certification under §1292(b). Just as the parties wrote for the judge a Rule 54(b) judgment, which he signed without comment, so they wrote for him a §1292(b) certification, which again he signed without change. Again the parties' draftsmanship and timing leaves much to be desired. Here is the operative part of the order they wrote for the judge:

> In this Court's opinion, its memorandum opinion and order of June 9, 1989 involves a controlling issue of law as to which there is [sic] substantial grounds for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation. This issue is, inter alia, whether the State's Attorney and/or Sheriff of DuPage County are county officials and/or policymakers for purposes of *Monell* liability under 42 U.S.C. §1983

Section 1292(b) requires the court to identify the issues, not to assert that one issue is important "inter alia"; we expect the court to *explain* why, rather than assert that, immediate appeal will materially advance the disposition. Courts should do their own writing. If they allow lawyers to draft for them, they should at least see to it that the lawyers have everything in order.

There is also a deeper flaw: delay. Appeals must be taken within a short time after the entry of the orders appealed from, and §1292(b) sets one of the shortest limits at ten days. Although Fed. R. App. P. 5(a) allows a judge to amend the ruling to add a §1292(b) certification at any time, we held in *Weir v. Propst*, 915 F.2d 283, 287 (7th Cir. 1990), that this power must not be used promiscuously. "An amendment that will have the effect of extending the limitation is proper only if there is a reason for the delay." In *Weir* neither the parties nor the judge gave a reason for the delay; we declined to accept the appeal. So here. Judge Leinenweber is silent on the question (the parties neglected to draft for him with *Weir* in mind), and the joint motion for leave to appeal gives as a reason only the skepticism expressed at oral argument about jurisdiction under §1291. *That* jurisdictional problem is largely attributable to the parties, and at all events the problem with the Rule 54(b) judgment was first flagged by the plaintiff's brief, filed in January 1990. Delay after that is unjustifiable, and we decline to accept an appeal from a certification made after oral argument in this court.

III

Imbler reserved all questions concerning the extent to which absolute prosecutorial immunity applies to investigation and preparation for trial. 424 U.S. at 430-31 & n.33. Some may be resolved this Term. *Burns v. Reed*, 894 F.2d 949 (7th Cir.), cert. granted, 110 S. Ct. 3269 (1990). In the interim we must reach a decision influenced by the functions immunity serves.

Buckley maintains that absolute immunity is limited to the trial itself. Fitzsimmons and the other defendants submit that anything leading up to trial is within the scope of absolute prosecutorial immunity. Responding to a question at oral argument, counsel for Fitzsimmons said that prosecutorial immunity would be absolute even if prosecutors tortured Buckley to obtain a confession. Neither of these limiting positions can be right.

Buckley's position would turn *Imbler* into a pleading rule. Anyone wishing to challenge his prosecutors would need only challenge the investigatory and preparatory steps that precede every prosecution, throwing in the appellation "conspiracy" for good measure. Immunity is not limited to cases filed and tried without investigation or planning; why should it protect only irresponsible prosecutors? Buckley wants to relitigate the merits of the criminal charge against him and to recover damages if the charge was unfounded; prosecutorial immunity prevents turning the tables in this fashion. *Imbler*, 424 U.S. at 425; *Butz v. Economou*, 438 U.S. 478, 512-17 (1978); *Mitchell v. Forsyth*, 472 U.S. 511, 522-23 (1985). See also *Yaselli v. Goff*, 12 F.2d 396 (2dCir. 1926), affirmed, 275 U.S. 503 (1927). If

absolute immunity has value – as the Supreme Court believes it does – we must prevent its evasion.

Fitzsimmons and the other defendants are wrong because immunity applies to the act, not the actor. *Forrester v. White*, 484 U.S. 219, 227 (1988). An Attorney General who approves a national security wiretap does not have absolute immunity, even though the information may lead to prosecution. *Mitchell*, 472 U.S. at 520-24. Courts regularly hold that prosecutors filling the roles of detectives must face the music for wrongs committed against suspects to the same extent as detectives do. E.g., *Auriemma v. Montgomery*, 860 F.2d 273 (7th Cir. 1988); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973). Police who use the third degree in interrogation, or break open doors, must show that their acts were objectively reasonable; the security of personal rights would be markedly diminished if the state could investigate at will, and without risk, by shifting the same functions to lawyers. Immunity is absolute only when the prosecutor performs distinctively prosecutorial functions.

A

Because immunity follows the act rather than the actor, it is essential to define "prosecutorial" acts. Any definition must depend in turn on why courts extend immunity to prosecutors in the first place. Why not use damages to induce proper conduct in every case? Because damages would lead prosecutors to temper their judgment. Tempering might be an acceptable cost of a damages regimen if the costs of prosecutorial errors were high, but the criminal process itself offers sufficient

opportunities to prevent harms, so that damages remedies are unnecessary. These considerations imply an appropriate scope of immunity.

Litigation has losers. They may "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate". *Imbler*, 424 U.S. at 425. Even the winners may be losers. Defendants may spend days, even years, in prison awaiting trial, as Buckley did. Yet litigation would be even more difficult and costly than it is if, after the first trial, there were a second with the positions of the parties reversed. Prosecutors, whose professional duties necessarily make the lives of some uncomfortable, would be special targets. Attorneys for the government could protect themselves from retaliation by quiescence. Victims of crime cannot compel prosecution of offenders or collect damages from passive prosecutors. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981). Society does not reward prosecutors for convicting the guilty; requiring prosecutors to compensate defendants for injury inflicted without giving them a bonus for the benefits they create would create a bias: in close cases it would always pay to forego prosecution. Yet society prefers to induce such prosecutions. Putting a case before a court is no evil, even when there is reason to doubt its strength. "A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would

trigger a suit against him for damages." *Imbler*, 424 U.S. at 426 n.24.

Prosecutors should (and most routinely do) take account of the costs they inflict on others. If suits were the only way to impress prosecutors with the gravity of these costs, damages could be a necessary evil – which is why police officers and even attorneys general do not possess absolute immunity when conducting investigations. Courts can curtail the costs of prosecutorial blunders without the need for damages, however, by cutting short the prosecution or mitigating its effects. *Mother Goose Nursery Schools, Inc., v. Sendak*, 770 F.2d 668, 674 (7th Cir. 1985). "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*, 438 U.S. at 512. Judges are involved early on. The principal cost of wrongful prosecution is the imprisonment of the defendant before trial. Yet imprisonment depends on a demonstration of probable cause in court. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Even after the prosecutor establishes probable cause, the judge may release the defendant on bail or ameliorate the harshness of imprisonment. Prosecutorial action is a necessary *but not sufficient* condition of imprisonment; injury will not long continue unless one or more judges is impressed with the gravity of the charge and the weight of the evidence assembled. If the evidence is enough to satisfy a judge, there is correspondingly less reason to blame the prosecutor. Of course there may be some reason; maybe the evidence has been cooked. Cf. *Malley v. Briggs*, 475 U.S. 335 (1986); *Jones v. Chicago*, 856 F.2d at 994. Absolute immunity depends on a

judgment that the probability of putting one over on a court is sufficiently low, and the burden of litigation afterward to determine *whether* prosecutors made up the case sufficiently high, that attempts to litigate the question should be foregone. This is a reasonable judgment when a court can step in early, curtailing the injury; it is not a sound conclusion when an act (by prosecutor or police officer) causes injury that is complete before the case reaches court. See *Mitchell*.

Prosecution causes injuries in addition to imprisonment. Accusations of crime impugn the good name of defendants. Trial is an unpleasant experience as well as an expensive one. But these injuries, too, may be curtailed by judicial action. Residual injuries have never been deemed sufficient to call for damages against public prosecutors, or even for such medicaments as interlocutory appeals. E.g., *Midland Asphalt Corp. v. United States*, 109 S. Ct. 1494 (1989); *Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Cobbledick v. United States*, 309 U.S. 323 (1940). Expense and inconvenience are endemic to any legal system; the costs of justice in ours do not imply either especially prompt review or damages afterward. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938); *PaineWebber Inc. v. Farnam*, 843 F.2d 1050 (7th Cir. 1988).

All of this suggests a simple demarcation. If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his

interests. If, however, a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity. Prosecutors who break open doors or torture suspects into confessing cause injuries that are complete outside of court, and which the judge cannot diminish (but may be able to compensate). Prosecutors whose out-of-court acts cause injury only to the extent a case proceeds will be brought to heel adequately by the court. *Butz*, 438 U.S. at 515-16.

Intermediate cases are not hard to imagine. Our own *Burns v. Reed* is one, in which the prosecutor gave legal advice to police who were considering whether to carry out a search. Injuries from illegal searches are felt out of court and without regard to the institution of a prosecution, which cuts against absolute immunity; on the other hand, the availability of prosecutorial advice may reduce the number of illegal searches, and allowing damages on account of bad advice may in the long run increase the number of improper searches. *Burns* will consider where the balance lies. Activities in our case may be put on one or another side of the line with greater confidence.

B

Fitzsimmons announced Buckley's indictment to the press on March 9, 1984. According to the complaint Fitzsimmons informed the press about the contents of the indictment and added comments, such as his belief that the bootprint evidence would establish Buckley's guilt and his belief that Buckley was involved in a burglary

ring. The district court, following *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988), concluded that Fitzsimmons is not entitled to absolute immunity for these statements, because they took place out of court and because press conferences are not "quasi-judicial" activities.

Whether press conferences are "quasi" something else does not matter, Immunity depends on how announcements could cause injury and on other functional considerations, not on nomenclature. *Imbler* expressly rejected a submission that the scope of absolute prosecutorial immunity should depend on the extent to which prosecutorial activity is "quasi-judicial". 424 U.S. at 420-21. We need to know how announcements injure, and where the constitutional wrong lies.

One possibility is that accusations of crime cause infamy. *Paul v. Davis*, 424 U.S. 693 (1976), holding that the Constitution does not deal with libel or slander by a public official, means that Fitzsimmons' announcement, standing alone, is not actionable under §1983. Some other injury is essential to create a constitutional wrong. Buckley maintains that the press conference created additional injury because a defendant with a blackened reputation will have trouble obtaining release on bail or a fair trial. The Nicarico murder was front page news throughout northern Illinois. So was the announcement of charges against Buckley, Cruz, and Hernandez; the press has followed the case avidly. By accusing Buckley of being a thief as well as a murderer, and by overstating the value of the bootprint evidence, the prosecutor improperly increased the chances of a conviction, Buckley's argument concludes.

This approach avoids the rock of *Paul* only by falling into the whirlpools of *Imbler*. For if the injury lies in an alteration of the probabilities at trial, the remedy lies in the criminal process rather than in damages litigation. Buckley was entitled to a decision on bail made on the record, as opposed to a decision made on the basis of prejudicial publicity. If the judge denied bail or set it too high, Buckley was entitled to appeal. Similarly, if the press conference poisoned some minds against him, Buckley was still entitled to a voir dire adequate to find unbiased jurors. If such a venire could not be found in DuPage County, Buckley was entitled to a change of venue – or to dismissal of the charges against him. See generally *Patton v. Yount*, 467 U.S. 1025 (1984); *Murphy v. Florida*, 421 U.S. 794 (1975); *Irvin v. Dowd*, 366 U.S. 717 (1961). If the judges who conducted the bail hearing and the trial did their jobs properly, they eliminated any constitutionally impermissible effects of the press conference. If they could not do so, then Buckley was entitled to the best remedy of all: dismissal of the prosecution.

Stating the constitutional wrong as an increase in the probability of an unfair trial demonstrates that absolute immunity applies to the announcement of the indictment. Given *Paul*, there was no (constitutional) injury independent of the indictment and trial. Buckley suffered no constitutional injury unless the judges failed to protect him at trial. This demonstrates that the suit against Fitzsimmons is a disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial. Either way, it cannot be the basis of an award of damages.

Stepanian and *Marx* hold that prosecutors do not have immunity when announcing indictments. These cases ask whether a press conference is "quasi-judicial", an approach different from *Imbler's*. Neither *Stepanian* nor *Marx* identifies any constitutional wrong independent of the conduct of the litigation. We therefore respectfully disagree with the eleventh circuit.*

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), reversed in part on other grounds, 446 U.S. 754 (1980), is the only other decision requiring comment. Parts of Judge Swygert's opinion in that case may be understood to say that absolute immunity is never available for pretrial statements. 600 F.2d at 632-33. But Judge Pell did not accept that conclusion, *id.* at 661-62 (dissenting opinion), and Chief Judge Fairchild accepted Judge Swygert's conclusions only to an extent, *id.* at 648 (concurring in Judge Swygert's opinion "except as qualified by the following observations."). Chief Judge Fairchild observed, *id.* at 649, that *Paul v. Davis* prevents any recovery because of injury to reputation. Judge Swygert's opinion concludes that a prosecutor may be liable for "pretrial prejudice", 600 F.2d at 632, which was left undefined. It may be that he conceived of a species of pretrial detriment outside the ambit of *Paul v. Davis;* at all events none of the opinions in *Hampton* discussed whether immunity is available when the theory is that out-of-court statements led to

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* Because our decision creates a conflict among the circuits, it was circulated before release to all judges in regular active service. See Circuit Rule 40(f). Judges Cudahy and Ripple voted to hear the case in banc. Chief Judge Bauer and Judge Flaum did not participate in the consideration or decision of this case.

adverse judicial decisions (denial of release on bail and failure to seat an impartial jury). As this is Buckley's theory, his way to avoid *Paul v. Davis*, we conclude that *Hampton* offers him no support. When pretrial publicity produces constitutional injury only to the extent it influences the course of bail hearings or trial, the prosecutor is absolutely immune from damages.

C

Buckley charges Fitzsimmons and two of his assistants, King and Knight with misconduct during the investigation and the presentation of the case to the grand jury. Judge Leinenweber dismissed all of these claims, concluding that absolute immunity covers the entire investigation of a case, meetings with witnesses, presentations to a grand jury, and formulation of a decision to prosecute.

In the main, these conclusions are unexceptionable. Presenting the case to the grand jury, for example, is part of the prosecution proper. The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury. *Gray v. Bell*, 712 F.2d 490, 502-05 (D.C. Cir. 1983); *Lovelace v. Whitney*, 684 F. Supp. 1438, 1442-43 (N.D. Ill. 1988), affirmed by unpublished order under the name *Lovelace v. Hall*, 886 F.2d 332 (7th Cir. 1989).

Conversations between the prosecutors and the bootprint experts similarly may not be the basis of liability. Obtaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from

what happens in court. Obtaining evidence from voluntary suppliers does not violate any of a defendant's rights; only using that evidence could do so. For the reasons we have given, when the injury depends on the costs of the judicial process (including the risk of judicial error), the prosecutor has absolute immunity. Allowing an award of damages on the basis of witness preparation would evade not only the prosecutorial immunity of *Imbler* but also the testimonial immunity of *Briscoe*. These immunities do not give way just because the plaintiff directs his fire against activities preparing for immunized presentations in court. *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978).

Buckley's allegation that assistant state's attorneys coercively interrogated *him* presents a different problem, however. Such interrogations may inflict injury before the judicial process begins, injury that would be no less if the grand jury declined to return an indictment. If a prosecutor participates in a raid that unconstitutionally invades a suspect's privacy, immunity is qualified rather than absolute. *Hampton v. Hanrahan*, 600 F.2d at 631-33; *Marrero v. Hialeah*, 625 F.2d 499 (5th Cir. 1980). For the same reason, if a prosecutor conducts a coercive interrogation, only qualified immunity is available. *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986); *Rex v. Teeples*, 753 F.2d 840, 843-44 (10th Cir. 1985). To the extent *Myers v. Morris*, 810 F.2d 1437 (8th Cir. 1987), holds that prosecutors are absolutely immune from liability on account of their participation in an unconstitutional interrogation, we respectfully disagree.

Liability is appropriate, however, only when the constitutional violation is complete, and causes injury, out of

court. A prosecutor could be liable for depriving a suspect of food and sleep during an interrogation, or beating him with a rubber truncheon, or putting bamboo shoots under his fingernails. A prosecutor could not be mulcted for conducting an interrogation without *Miranda* warnings, because a suspect has no entitlement to the warnings themselves. *Miranda* warnings protect the right to counsel and have no independent stature. Interrogations without *Miranda* warnings thus do not violate a suspect's rights; the violation occurs only when the statements are used in criminal proceedings. *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976); cf. *Oregon v. Elstad*, 470 U.S. 298, 305-07 (1985); *Michigan v. Tucker*, 417 U.S. 433, 445-46 (1974). There is likewise no violation in "compelling" a suspect to speak, where the compulsion does not involve practices forbidden on other grounds. The right not to be compelled to testify against oneself is an evidentiary privilege. As the use immunity cases show, the government may require a suspect to speak, so long as it does not use the results against him. *Kastigar v. United States*, 406 U.S. 441 (1972). Arguments based on *Miranda* and the self-incrimination clause concern the conduct of the trial and therefore may not be the basis of damages; coercive tactics that are independently wrongful may, however, lead to awards.

It is too early to tell whether Buckley is relying on *Miranda* and the self-incrimination clause, or on the more general right not to be punished (through coercive tactics) in advance of trial. It was accordingly premature to dismiss this aspect of Buckley's complaint. He is entitled to produce evidence, if he has any, tending to show that

the prosecutors used tactics adding up to pretrial punishment. Because the injury from such tactics does not depend on the filing of an indictment or the conduct of trial, the prosecutors have no more than qualified immunity.

IV

Last comes the question whether the three expert witnesses have absolute immunity for their pretrial activities: evaluating the bootprint, writing reports, discussing the case with prosecutors, and preparing to testify. We agree with the district court that they do. *Briscoe* holds that the presentation of testimony may not be the basis of liability, even if the witness deliberately misleads the court. It would be a hollow immunity if the aggrieved party could turn around and say, in effect: "True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony." Substance is exactly what *Briscoe* puts off limits.

An expert could violate a suspect's rights independently of the litigation. The expert might, for example, break into the suspect's home to obtain samples for analysis. Absolute immunity would not apply to that theft, for the same reason it does not apply to prosecutorial infliction of punishment without trial. A non-testimonial expert could violate a suspect's rights by "cooking" a laboratory report in a way that misleads the testimonial experts. Experts, like the police, "cannot hide behind [the immunity of] the officials whom they have defrauded."

Jones v. Chicago, 856 F.2d at 994. But nothing in the complaint suggests that the three expert defendants hid evidence, as opposed to misinterpreting it.

Discussions between the prosecutors and the experts violated none of Buckley's rights. Preparing to commit slander or perjury is not actionable. The testimony itself is covered by immunity. Buckley makes it clear that the testimony is the real gravamen of his complaint. Olsen, he submits, "wrongfully changed his initial opinion"; Robbins was an "utterly disreputable witness-for-hire". Maybe so, but cross examination rather than a suit for damages is the right way to establish these things. Junk science is a plague in contemporary litigation, but the peddlers of poorly supported theories do not expose themselves to liability by doing research out of court or appearing in more than one case.

White v. Frank, 855 F.2d 956 (2d Cir. 1988), holds that *Briscoe* does not apply to "complaining witnesses". Buckley contends that the three experts are in this category, because but for their opinions the State's Attorney would not have obtained an indictment. The parallel is not apt. None of the experts invented the report of a crime or brought the fable to the state's attention. Jeanine Nicarico is dead. Each expert was brought into the case by the prosecutors, who sought to evaluate the strength of the evidence against Buckley. We therefore need not decide whether to follow *White*.

To sum up: We decline to accept the appeal on the district court's certification under §1292(b). DuPage County's appeal, No. 89-2900, is dismissed on the

County's motion. Buckley's appeal, No. 89-2899, is dismissed to the extent is [sic] seeks relief against DuPage County and Fitzsimmons. We affirm the remainder of the decisions under review on appeal No. 89-2899, with the exception of the contention that the prosecutors engaged in coercive interrogation. The decision is vacated to the extent it dismissed this portion of the complaint and the case is remanded for further proceedings concerning Fitzsimmons, King and Knight consistent with Part III.C of this opinion. On Fitzsimmons' appeal, No. 89-2441, the decision of the district court is reversed, and the case is remanded with directions to dismiss the complaint to the extent it seeks damages on account of the press conference at which Fitzsimmons announced the indictment.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part and concurring in part:

For the most part, I concur. I, however, have a different view concerning the immunity of prosecutor Fitzsimmons for his alleged creation of prejudicial pretrial publicity. With great respect, I think that Part III, B of the opinion fails to examine the nature of the particular function Fitzsimmons was performing so as to determine whether it presented the public interest needs which justify absolute immunity.

The majority says, "If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests." This "demarcation" is applied to Mr. Fitzsimmons's press conference statements which are alleged to militate against a fair trial.

The majority leans on the fact that as defendant, Buckley may have been able to protect himself by procedures afforded in the criminal case itself. With all respect, absolute immunity should be recognized only when the purpose of such immunity is served.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court decided to afford the same absolute immunity under section 1983 that the prosecutor enjoys at common law. *Id.* at 427. The considerations underlying such immunity include "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. The Court agreed that the prosecutor's activities under consideration "were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." The Court did not consider whether "like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate." *Id.* at 430-31 (footnotes omitted).

In the Supreme Court's most recent absolute immunity case, *Forrester v. White*, 484 U.S. 219, 227 (1988), the Court considered the scope of judicial immunity and decided that demoting or discharging a probation officer was not a function which entitles a judge to immunity. The Court explained its functional approach saying, "[W]e examine the nature of the functions with which a particular official or class of officials has been lawfully

entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy. . . . " *Id.* at 224. The Court did note that court procedures provide safeguards, *id.* at 227, but it did not present the safeguards as a reason for conferring immunity.

Even in *Butz v. Economou*, 438 U.S. 478, 511-512 (1978), a case in which the Court extensively discussed judicial procedure as a safeguard, the Court examined the adequacy of the protections only after it determined that the administrative judges and prosecutors whose immunity was at stake were performing the functions that entitle judges and prosecutors in the judicial branch to absolute immunity.

It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.

Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage,

such as a press conference, where the purposes to be served by immunity do not apply.

Whether Buckley has sufficiently pled or could prove that Fitzsimmons's statements at the press conference deprived him of constitutional rights seems to me to pertain to the merits, which have not yet been reached.

I would affirm the district court's denial of absolute immunity for Fitzsimmons with respect to his press conference statements.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

No. 90-7574

STEPHEN BUCKLEY

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

The motion for leave to appeal *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burns v. Reed*, 500 U.S. ___ (1991).

October 7, 1991

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2441, 89-2899, and 89-2900

STEPHEN BUCKLEY,

Plaintiff-Appellee – Cross-Appellant,

v.

J. MICHAEL FITZSIMMONS, *et al.*,

Defendants-Appellants – Cross-Appellees.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES.

SUBMITTED NOVEMBER 15, 1991 – DECIDED JANUARY 2, 1992

Before WOOD, Jr. and EASTERBROOK, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

PER CURIAM. The Supreme Court remanded this case to us for reconsideration in light of *Burns v. Reed*, 111 S. Ct. 1934 (1991). 112 S. Ct. 40 (1991). *Burns* potentially affects the availability of immunity on two subjects: Fitzsimmons' press conference announcing Buckley's indictment, and the prosecutors' and witnesses' preparations for trial. Buckley contends that we should reconsider our decisions concerning appellate jurisdiction, but

his petition for certiorari did not present any jurisdictional question to the Supreme Court. As instructed, we limit our consideration to the effect of *Burns*.

Burns holds that prosecutors are not entitled to absolute immunity for advice to police concerning the propriety of hypnosis and probable cause to make an arrest. It also holds that prosecutors are absolutely immune from damages on account of injuries they inflict during the course of an *ex parte* probable cause hearing that led to the issuance of a search warrant. Our case is not directly governed by *Burns*. Indeed, our initial decision recognized that *Burns* was awaiting decision by the Supreme Court, and we observed that the subjects are distinct. 919 F.2d 1230, 1239, 1242 (7th Cir. 1990). Still, the reasoning of a case may reach beyond its holding, and the Court has invited us to revisit the subject.

First we take up the preparation for trial. Law enforcement officials asked four persons to determine whether Buckley's shoe made the bootprint found on the Nicaricos' door. One said no; a second said maybe; a third said probably, and the fourth said yes. All but the one who said no testified against Buckley, who seeks damages from all three. He also seeks damages from the prosecutors for their "supervision of and participation in a year long pre-arrest and pre-indictment investigation". Our initial opinion held that both the witnesses and the prosecutors are entitled to absolute immunity for these activities, save to the extent they independently violated Buckley's rights. (We remanded for further proceedings on Buckley's claim that the prosecutors coerced him to give pretrial statements.) According to *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Briscoe v. LaHue*, 460 U.S. 325

(1983), both prosecutors and witnesses are entitled to absolute immunity for what happens in court. We remarked: "It would be a hollow immunity if the aggrieved party could turn around and say, in effect: 'True, your *delivery* of bad testimony is immunized, but preparing to deliver that testimony is not, so I can litigate the substance of your testimony.' " 919 F.2d at 1245.

Nothing in *Burns* undermines that holding. It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to *un*prepared events at trial! Allowing evasion through litigation about preparation for trial would make no more sense than undermining judicial immunity by entertaining a suit against the law clerk who participated in the preparation of the opinion. See *Mitchell v. McBryde*, 944 F.2d 229 (5th Cir. 1991); *Oliva v. Heller*, 839 F.2d 37 (2d Cir. 1988). Immunities cover not only the core functions sought to be protected but also normal preparatory steps. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503-07 (1975).

Although *Burns* distinguishes "prosecutorial" activities from "investigative" ones, it is word play to call prosecutors' endeavors in asking experts for assistance "investigative" in the way hypnotizing or arresting suspects is. Talking with (willing) experts is trial preparation, no different from putting evidence under a microscope in a laboratory. (Interrogating Buckley is a different matter, which is why we directed further proceedings on claims about the prosecutors' treatment of him.) Slapping the label "conspiracy" on the process, as Buckley does, adds nothing.

Imbler said it straight: "[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution". 424 U.S. at 431 n.33. *Burns* did not express a different view; instead it quoted this language with approval. 111 S. Ct. at 1941-42. What goes for prosecutors goes for witnesses too. We therefore reiterate the conclusion of our initial decision: unless the act of gathering and evaluating the evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment), both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court. See also *Millspaugh v. Wabash County Department of Public Welfare*, 937 F.2d 1172, 1175 (7th Cir. 1991), concluding that *Burns* "reinforces *Buckley's* approach."

Burns bears more strongly on Buckley's claim arising out of the press conference. Like the advice to the police in *Burns*, the press conference took place out of court and was not part of preparation for trial. The prosecutor acted as a public official informing residents about the activities of his office – and perhaps preparing for an election campaign – rather than as an advocate. It does not follow, however, that the press conference should be assimilated to advising police to arrest a suspect, the subject of *Burns*. An arrest causes injury whether or not a prosecution ensues. So too a press conference may cause injury no matter what happens later – but the injury in question is defamation, which under *Paul v. Davis*, 424 U.S. 693 (1976), is not a constitutional wrong. See also *Siegert v. Gilley*, 111 S. Ct. 1789 (1991). Fitzsimmons does not need

immunity to defeat a claim of defamation, because Buckley has none. (Buckley contends that our original decision misapplies *Paul*. But this topic was not raised in the Supreme Court – the petition for certiorari does not cite *Paul* – and so is not encompassed within the remand.)

According to Buckley, the press conference violated his rights because the publicity deprived him of a fair bail hearing and trial. Buckley protests, in other words, what happened *in court* – that the judge erred in refusing to dismiss the prosecution on account of prejudicial publicity, or at least to enlarge him pending trial. Because the sting (apart from the defamation) depends on judicial action, *Imbler* confers immunity. So we remarked in *Millspaugh*, 937 F.2d at 1175: "the dividing line between absolute and qualified immunity is whether the injury depends on the judicial decision. If there would be no loss but for the judge's acts, then the prosecutor or witness who induces the judge to act has absolute immunity. . . . *Burns* held a lawyer absolutely immune from liability for acts while representing the state during a probable cause hearing but only qualifiedly immune for giving legal advice to the police; the principal distinction was that the advice (and the officers' acts in reliance on that advice) could cause injury without the mediation of a judge." Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge. The defamation aspect of Buckley's claim fails under *Paul* and *Siegert*, the remainder under *Imbler*.

Burns identifies three considerations governing the scope of prosecutorial immunity: the common law in 1871 (when Congress enacted 42 U.S.C. §1983), the risk of vexatious litigation if immunity is unavailable, and the

role of the judicial process in controlling the prosecutor if damages are unavailable. The first of these favors Buckley, for common law immunity did not extend to press conferences. This may be an artifact: if courts do not recognize particular conduct as actionable, they have no reason to discuss immunity. No court would have thought a prosecutor's announcement of an indictment actionable in the first place in the nineteenth century. Justice Scalia, concurring in *Burns*, maintained that immunity at common law is a necessary condition for immunity in an action under §1983. 111 S. Ct. at 1945. This approach, if adopted, would sever the link between immunities in §1983 actions and those in *Bivens* actions established by cases such as *Butz v. Economou*, 438 U.S. 478 (1978), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Liability directly under the Constitution is a modern development, and it is accordingly hard (maybe impossible) to find corresponding immunities. So, too, it is hard to find immunities corresponding to recent enlargements in substantive liability. Cf. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2783 (1991) (Scalia, J., concurring) (observing that although state law ordinarily supplies statutes of limitations, federal law properly may be matched to newly minted theories of liability). The majority did not stop with the common law in *Burns*.

The second and third considerations favor Fitzsimmons. Buckley wants to use the press conference as the fulcrum to attack the substance of the charges laid against him, even though their presentation in court cannot be the basis of damages. So although the concern about

vexatious litigation is limited to "actions that are connected with the prosecutor's role in judicial proceedings", *Burns*, 111 S. Ct. at 1943, Buckley places that role (like the prosecution itself) in question. As for the third consideration: this was at the core of our original decision. We relied particularly on this language from *Butz*, 438 U.S. at 512: "[S]afeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." 919 F.2d at 1241. *Burns* quoted the same language with approval, 111 S. Ct. at 1942, and called the judicial process "one of the most important checks", *id.* at 1944. As we have been at pains to establish, Buckley had the benefit of the judicial process. If the press conference created prejudicial publicity, the injury occurred because of judicial action. It is only because the judge denied Buckley's application for release before trial and refused to dismiss the indictment that he suffered the loss for which he seeks damages from Fitzsimmons.

Buckley spent three years in jail. He craves vindication and redress. Yet for all counsel's inventiveness, it is apparent that he challenges the prosecution itself. *Imbler* reflects a judgment that prosecutors should be free to press criminal charges without fear that prosecuting the wrong person, or the right person in the wrong way, will lead to financial ruin.† If, as Buckley insists, *Imbler* was

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† State and local governments can prevent this effect for themselves by indemnifying their officers, and many do so. Indemnification enables public officials to set their personal concerns aside, assures adequate compensation of those the state has injured, and induces the government to exercise better control over those who exercise public power. Yet not all governmental bodies indemnify their employees, and the same principles of immunity apply to all. If the promise of indemnity were to enlarge public officers' liability (and thus the cost of the indemnity), states would be inclined to jettison or curtail their programs. Thus we approach the subject, as the Supreme Court consistently does, on the assumption that the defendants must pay any awards personally.

wrongly decided, he should press that argument in the only forum that can entertain it.

Buckley presents claims against governmental bodies that do not possess immunity and against the prosecutors who interrogated him; the former we have not addressed, and the latter we have remanded for further proceedings. Buckley's memorandum filed in this court after remand asserts that one or more of the assistant state's attorneys actually arrested him. Had we perceived on the original appeal that Buckley was making such a claim, we would have included it among the subjects remanded to the district court. The rationale behind Part III.C of our opinion, 919 F.2d at 1243-44, applies equally to a claim of arrest without probable cause. See also *Malley v. Briggs*, 475 U.S. 335 (1986); *Millspaugh*, 937 F.2d at 1176. We modify our judgment to direct the district court to explore the allegation that the persons who arrested him lacked probable cause. All other claims are barred by immunity, and we reenter our original judgment except to the extent we have described.

FAIRCHILD, *Senior Circuit Judge*, dissenting in part: I adhere to my earlier dissent, concluding there was no absolute immunity for the prosecutor's press conference. *Buckley*, 919 F.2d at 1245.

Going on from there, the Supreme Court in *Burns* seems to draw a line between "conduct closely related to the judicial process," *Burns*, 111 S. Ct. 1943, and conduct in the role of "administrator or investigative officer." *Id.* at 1942. As to the latter functions, the prosecutor has only the protection of qualified immunity. The *Burns* Court seems to imply that the increased availability of the defense of qualified immunity is a reason for not expanding, and, perhaps, construing narrowly the application of absolute immunity for prosecutors. *Id.* at 1944.

My brethren draw the line between investigation and "preparation," evidently deeming preparation for trial sufficiently close to the judicial process to entitle the prosecutor to absolute immunity. I agree that a prudent prosecutor will interview witnesses and test other evidence brought to him by investigators in advance of trial. He may well ask for further investigation of areas of a case. I can agree that such "preparation" should fall on the absolute immunity side of the line. Plaintiff claims, however, that Mr. Fitzsimmons played a very aggressive role in seeking favorable expert evidence linking the incriminating boot print to plaintiff, and in "supervision of and participation in a year long pre-arrest and pre-indictment investigation." I am unable to conclude as a matter of law that this alleged conduct falls on the side of the line to which the *Burns* Court ascribed absolute immunity.

SUPREME COURT OF THE UNITED STATES

No. 91-7849

Stephen Buckley,

Petitioner

v.

Michael Fitzsimmons, et al.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted limited to Questions 1 and 2 presented by the petition.

October 5, 1992

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 91-7849

In The

Supreme Court of the United States

October Term, 1992

STEPHEN BUCKLEY,

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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QUESTIONS PRESENTED

1) Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of, and participation in, a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?

2) Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability because some of the injury occurred during the later criminal proceedings?

LIST OF PARTIES

The parties to the proceeding before the United States Court of Appeals for the Seventh Circuit were the County of DuPage, J. Michael Fitzsimmons, James Ryan, Robert Kilander, Thomas Knight, Patrick King, Edward German, Robert Olsen and the Estate of Louise Robbins.

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Seventh Circuit are reported at 952 F.2d 965 (1991) (J.A. 102-110), and 919 F.2d 1230 (1990) (J.A. 66-100). The decision of the United States District Court for the Northern District of Illinois (J.A. 25-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 2, 1992. The Petition for Writ of Certiorari was filed on April 1, 1992, and was granted on October 5, 1992. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A) 42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

B) Ill. Rev. Stat. Ch. 34 §3-9005

§3-9005. Duties of State's attorney. The duty of each State's attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the

circuit court for his county, in which the people of the State or county may be concerned.

(2) To prosecute all forfeited bonds and recognizances, and all actions and proceedings for the recovery of debts, revenues, moneys, fines, penalties and forfeitures accruing to the State or his county, or to any school district or road district in his county; also, to prosecute all suits in his county against railroad or transportation companies, which may be prosecuted in the name of the People of the State of Illinois.

(3) To commence and prosecute all actions and proceedings brought by any county officer in his official capacity.

(4) To defend all actions and proceedings brought against his county, or against any county or State officer, in his official capacity, within his county.

(5) To attend the examination of all persons brought before any judge on habeas corpus, when the prosecution is in his county.

(6) To attend before judges and prosecute charges of felony or misdemeanor, for which the offender is required to be recognized to appear before the circuit court, when in his power so to do.

(7) To give his opinion, without fee or reward, to any county officer in his county, upon any question or law relating to any criminal or other matter, in which the people or the county may be concerned.

(8) To assist the attorney general whenever it may be necessary, and in cases of appeal from his county to the Supreme Court, to which it is the duty of the attorney general to attend, he shall furnish the attorney general at least 10 days before such is due to be filed, a manuscript of a proposed statement, brief and argument to be

printed and filed on behalf of the people, prepared in accordance with the rules of the Supreme Court. However, if such brief, argument or other document is due to be filed by law or order of court within this 10 day period, then the State's attorney shall furnish such as soon as may be reasonable.

(9) To pay all moneys received by him in trust, without delay, to the officer who by law is entitled to the custody thereof.

(10) To notify, by first class mail, complaining witnesses of the ultimate disposition of the cases arising from an indictment or an information.

(11) To perform such other and further duties as may, from time to time, be enjoined on him by law.

(12) To appear in all proceedings by collectors of taxes against delinquent taxpayers for judgments to sell real estate, and see that all the necessary preliminary steps have been legally taken to make the judgment legal and binding.

STATEMENT OF THE CASE

This is a damages action brought pursuant to 42 U.S.C. §1983 and state law by petitioner Buckley. Petitioner's amended complaint alleged that respondent DuPage County State's Attorney Fitzsimmons, his successor, respondent James Ryan, respondent assistant state's attorneys Knight, King, and Kilander, Sheriff Doria of DuPage County, several deputy sheriffs, and several forensic personnel, individually and in conspiracy, fabricated evidence against him and wrongfully arrested, imprisoned and prosecuted him for a murder and rape that they knew he did not commit, and also engaged in a media campaign designed to destroy petitioner's right to

fair hearings and trial and to publicly defame him. As a result of defendants' wrongdoing, petitioner was wrongfully arrested, and imprisoned for three years. J.A. 3-24.

On February 25, 1983, 11 year old Jeanine Nicarico was abducted from her home in Naperville, DuPage County, Illinois. Several days later her body was discovered; she had been sexually molested and murdered. J.A. 6, ¶ 19. An intensive investigation into the crime was jointly undertaken by the DuPage County State's Attorney's Office and the DuPage County Sheriff's Department. This investigation was under the joint direction and responsibility of respondent Fitzsimmons and Sheriff Doria; respondents Knight and King were involved with the sheriff's police in all the early stages of the investigation. J.A. 6-10, ¶ 20, 25, 28, 30, 32.

The crime engendered extensive publicity and aroused intense emotions among the populace of DuPage County, and this created great public pressure on respondents to find someone to charge. J.A. 7, ¶ 21. After a mentally disturbed and totally incredible person, Alex Hernandez, said petitioner was present at a post-murder conversation where someone else talked about the murder, respondents and other investigators worked together for several months to fabricate evidence against petitioner, Hernandez, and Rolando Cruz. J.A. 7, 10, 12, ¶ 22, 35, 42, 43.

The most significant piece of evidence respondents concocted involved a bootprint found on the Nicarico's door. After investigators interrogated petitioner, he voluntarily gave them his boots so that they could compare them with the bootprint. J.A. 7, ¶ 23. The sergeant in charge of the identification section of the DuPage County Crime Laboratory determined that the boots did not

match the print, the head of the crime laboratory confirmed this, and respondents were informed of this conclusion. J.A. 8, ¶ 25. When Sheriff Doria was informed of the non-match, he confiscated the boots before the sergeant could complete his tests and report, and sent them to Edward German of the Illinois Department of Law Enforcement Crime Laboratory, in an attempt to get an opinion that the boot and print did match. J.A. 8, ¶ 26, 27. Although German initially wrote in his notes that the boot "could have at best" made the print on the door, and that "another shoe could very well have made the print," respondent Knight persuaded him to change his opinion to falsely link petitioner's boots and the print. J.A. 8, 14, ¶ 27, 53, 55.

Respondents generated further false bootprint evidence against petitioner from Robert Olsen and Louise Robbins. J.A. 8, ¶ 28. Olsen, who worked at the Kansas Crime Laboratory, initially concluded that "the paucity of sufficient similar individual characteristics (between the boot and the print) precluded a positive identification." J.A. 8-9, ¶ 29. Subsequently, respondents induced him to change his conclusions so as to falsely implicate petitioner. J.A. 14, ¶ 53. Even though the boot and print did not in fact match at all, respondent Knight finally procured the "positive identification" he and the others had been searching for from Louise Robbins, an anthropologist whose theories and reputation were well known to be discredited.[1] J.A. 9, 14, ¶ 31, 53.

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[1] Among Robbins' wild claims was her assertion that she could identify the wearer of a shoe with certainty even if she had only prints made with different shoes. J.A. 70.

Next, respondents Knight and King induced Hernandez to make false statements inculpating petitioner by offering him reward money (J.A. 11, ¶ 39), and respondent Knight paid money to Cruz in return for him falsely inculpating petitioner. J.A. 11, ¶ 40. Respondents were aware that both statements were false. J.A. 11, ¶ 39, 40.

Respondents Knight and King and other investigators repeatedly interrogated petitioner, using intimidation and intense pressure, but petitioner steadfastly maintained his innocence and demonstrated no knowledge of the crime. J.A. 9-10, ¶ 32. Although an experienced detective working on the case told Knight, King, and Doria that petitioner was not involved in the crime (J.A. 10, ¶ 33, 34), Knight, King, and Fitzsimmons continued their efforts to create false evidence against petitioner by calling him before a special investigative grand jury impaneled solely for the purpose of investigating the Nicarico case, and intimidating him during his interrogation. J.A. 9-10, ¶ 32, 35, 36. They also misrepresented the bootprint evidence to the grand jury and withheld those portions of that evidence which were unfavorable to them, introduced the false statements of Hernandez and Cruz, and presented much incredible, irrelevant, false, and contradictory hearsay and double hearsay evidence in order to prejudice petitioner. J.A. 10-11, ¶ 37-39.

Despite this abuse of the grand jury, respondent Fitzsimmons publicly admitted on January 27, 1984, that he had insufficient evidence to indict or prosecute. J.A. 11, ¶ 41. Then, on March 9, 1984, only a few days before a hotly contested primary election for State's Attorney, Fitzsimmons, Knight, and King obtained grand jury indictments against petitioner, Hernandez and Cruz, despite the fact that no new evidence of significance had

been presented since respondent Fitzsimmons' admission of January 27th. J.A. 12, ¶ 42, 46. There was no probable cause for these indictments, which were obtained in order to aid Fitzsimmons' re-election campaign, to diffuse public pressure, to cover up respondents' inability to solve the crime, and to coerce petitioner and his co-indictees to reveal information about the crime and/or to falsely inculpate themselves or each other. J.A. 12, ¶ 43. All three were arrested and imprisoned at the direction of respondent Knight and Sheriff Doria, unable to make their $3,000,000 bond. J.A. 12-13, ¶ 42, 46.

In order to reap political benefits from this extremely high profile case, Fitzsimmons appeared at a press conference that same day. J.A. 12, ¶ 44. Knowing that his statements would violate petitioner's right to a fair trial and defame him, and aware of the pre-existing public emotion and prejudice against anyone connected with the crime, Fitzsimmons nonetheless referred to prior criminal conduct alleged against petitioner and falsely claimed that he was part of a burglary ring, asserted that petitioner was guilty of the Nicarico murder, misrepresented evidence, including the bootprint evidence, and released mug shots of petitioner to the media. J.A. 12, 19, ¶ 44, 78.

After the indictment, respondents continued to attempt to create false evidence. Investigators, including respondents Knight and King, attempted to obtain false admissions and false testimony from petitioner, Hernandez and Cruz by threatening the death penalty if they did not cooperate. J.A. 12-13, ¶ 46. Persons within the Sheriff's Department who objected to the false arrest and prosecution were given unfavorable assignments and forced to resign (J.A. 13, ¶ 49); and Knight and King suppressed the favorable bootprint evidence which was

only discovered by petitioner's counsel through independent investigation on the eve of trial. J.A. 13, ¶ 50.

In November, 1984, respondent Ryan replaced Fitzsimmons as State's Attorney. He appointed Knight, who had left the office, as the Special State's Attorney for the Nicarico prosecution, and approved and authorized the continued imprisonment and prosecution of petitioner and his co-indictees. J.A. 14, ¶ 52. Knight continued to work with investigators and witnesses to further construct and shape the bootprint evidence so as to falsely implicate petitioner. J.A. 14, ¶ 53. In January, 1985, the case came to trial in an atmosphere poisoned by prejudice against petitioner, caused in part by public statements made, or prompted, by respondents, including Fitzsimmons. J.A. 14, ¶ 54. At trial, respondents Knight and King presented the bootprint evidence of German, Olsen and Robbins which they had previously fabricated, and the false statements of Hernandez and Cruz. J.A. 14-15, ¶ 55, 56. Despite this concerted effort by respondents to falsely convict him through prejudice and false evidence, the jury was hung as to petitioner and a mistrial was declared. J.A. 15, ¶ 57.

Respondents continued to falsely imprison and accuse petitioner. J.A. 15, ¶ 58. They publicly announced they would retry petitioner, while Fitzsimmons, who was no longer the State's Attorney but who continued to participate in the wrongful imprisonment of petitioner, made public statements to the media in which he again falsely claimed petitioner was guilty of raping and killing Jeanine Nicarico. J.A. 15, ¶ 58, 59. In addition, the prosecutors, including Knight, continued to fan the flames of prejudice by encouraging and prompting the Nicarico

family and friends to make inflammatory statements that petitioner was guilty of the crime. J.A. 15, ¶ 59.

Petitioner remained imprisoned pending the proposed re-trial, still held on the $3,000,000 bond, which was set so high because of the emotions and prejudice engendered by the public statements of respondents. J.A. 12-13, 15, ¶ 45, 46, 58. In June, 1985, respondents Knight, Kilander and Ryan were informed that an admitted serial child murderer, Brian Dugan, had confessed that he alone raped and murdered Jeanine Nicarico. J.A. 15-16, ¶ 60-62. Despite this admission, which was corroborated both by Dugan's recitation of details that would be known only to the murderer and by his successfully passing a polygraph test, respondents Ryan, Knight, and Kilander continued to wrongfully imprison petitioner, and Knight made false and misleading statements to the media attempting to discredit Dugan's confession, in order to maintain and increase public prejudice against petitioner, and to thereby justify his continued imprisonment. J.A. 16-17, ¶ 62, 64, 65.

Respondents opposed petitioner's attempt to lower his bond, even in the face of a report from a highly respected FBI bootprint expert demonstrating that petitioner's boot did not make the bootprint on the door. J.A. 17, ¶ 66. Aware that the manufactured case against petitioner was crumbling, and that petitioner would have to be released unless more evidence was fabricated, respondent Kilander interrogated a prisoner for the purpose of investigating an alleged inculpatory statement made by petitioner. J.A. 17, ¶ 67. Kilander subsequently claimed he had obtained such a statement, but this claim was a fabrication by Kilander. J.A. 17, ¶ 68. Nevertheless, this purported statement caused the further postponement of

petitioner's retrial, and thus his continued imprisonment. J.A. 17, ¶ 68. Petitioner remained imprisoned until March, 1987, when respondents Ryan, Knight, Kilander and King used Louise Robbins' death as a pretext to dismiss the charges against him, while refusing to publicly acknowledge that petitioner was innocent of the Nicarico murder and that they had arrested and imprisoned the wrong man. J.A. 18, ¶ 72.

The Dugan confession led to an Illinois State Police investigation which convinced both the police commander assigned to the case and the Director of the Illinois State Police that Dugan had acted alone in raping and killing Jeanine Nicarico. *Presumed Guilty*, L.A. Times, Nov. 1, 1992, at 18, 22-25. The Police Chief of Naperville, where the crime took place, concurred that respondents had charged, arrested and prosecuted the wrong men, and was thrown out of respondents' office for telling them so. *Id.* at 25. Nonetheless, after the Illinois Supreme Court reversed Cruz and Hernandez' convictions, respondents retried these men. Cruz was again convicted and again sentenced to death. *Id.* at 25, 58-59. The jury hung at Hernandez' second trial. He was tried a third time and convicted, but the judge, unconvinced of his guilt, refused to give him the death penalty, and his conviction is currently on appeal. *Id.* at 59. On Cruz' second appeal the prosecution was represented by the Illinois Attorney General's office. *See, A Prosecutor's Duty*, ABA Journal, June 1992, at 28-9. In March, 1992, the Assistant Attorney General assigned to defend the Cruz conviction on appeal resigned, saying that, after reading the record, she "had no doubt" that Dugan committed the crime alone, and called on the Attorney General to confess error. *Id.* at 28. The Attorney General, however,

refused to do so, and is now defending the conviction before the Illinois Supreme Court. *Id.* at 28.

PROCEEDINGS BELOW

The district court dismissed all claims against the prosecutors and forensic personnel, except for the claim against Fitzsimmons for his public statements at the pretrial press conference, on the basis of absolute prosecutorial immunity, and entered a Rule 54(b) judgment.[2] J.A. 25-65. Fitzsimmons appealed, as of right, the portion of the decision which denied him absolute immunity, and petitioner appealed the dismissal of the remaining claims.

The court of appeals refused to review petitioner's appeal as to respondent Fitzsimmons because a "factually related" claim against Fitzsimmons remained undismissed at the time of the appeal. J.A. 75-82.[3] On the merits, the court of appeals declined to wait for this Court's then imminent decision in *Burns v. Reed*, 500 U.S. ___, 111 S. Ct. 1934 (1991), but instead forged ahead to further expand prosecutorial immunity. The court characterized petitioner's allegations against respondent prosecutors as "coercive interrogations in 1983 and 1984 by police and prosecutors, arm-twisting of experts which led them to 'find' similarities between his shoes and the bootprint, misleading presentations to the grand jury,

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[2] The court also upheld petitioner's *Monell* claims as to the Sheriff but not as to the State's Attorney, holding that the Sheriff was a county official, while the State's Attorney was a state official.

[3] For the same reason, the court refused to review the dismissal of the *Monell* claim based upon the actions of the State's Attorney. The court rejected as tardy the district court's later certification of these issues under 28 U.S.C. §1292(b).

indictment, and stubborn refusal to dismiss the case despite Dugan's confession." J.A. 74. It acknowledged that "immunity is absolute only when the prosecutor performs distinctly prosecutorial functions" and that immunity "follows the act, rather than the actor" (J.A. 84), but then held that the determinative factor was not the nature of the act standing alone, but rather the circumstances and locus of the injury occasioned by the act: "If the injury flows from the initiation or prosecution of the case then the prosecutor is immune . . . (but) (i)f . . . a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity." J.A. 87-8. Purporting to apply this principle, the court extended absolute immunity to respondents for their involvement in "the entire investigation of (the) case, meetings with witnesses, presentation to (the) grand jury, and formulation of (the) decision to prosecute." J.A. 92.[4]

The court further held that since Fitzsimmons' statements at the pretrial press conference were alleged to have caused injury during the criminal process – they prejudiced the jury so that an acquittal was not obtained, and the Judge so that he would not reduce petitioner's bond even after the jury hung and Dugan confessed – absolute immunity applied again. J.A. 88-92.[5] The court

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[4] The court also held that absolute immunity did not apply to respondents' interrogation of Buckley if the injury occasioned by the interrogation was complete before the judicial process was initiated. J.A. 93-95.

[5] The court acknowledged that this holding was contrary to *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988), and in apparent conflict

also affirmed the district court's award of absolute immunity to the forensic personnel for their pre-trial activities. J.A. 95-97.

Judge Fairchild dissented on the issue of Fitzsimmons' public statements, stating:

> It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity.
>
> Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply.

J.A. 99-100.

In March, 1991, petitioner filed his first Petition for Certiorari, raising the following questions for review:

> 1. Whether a prosecutor who makes an out of court public statement in which he falsely asserts that a criminal defendant in a kidnap-murder is guilty and is also a member of a burglary ring, misrepresents evidence in the murder-kidnap case and releases the defendant's mug shot, is protected by absolute prosecutorial immunity against civil liability?

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with its prior decision in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), and therefore circulated its opinion to the entire court. Two judges voted to rehear the issue *en banc*, while two others recused themselves. J.A. 91-2.

> 2. Whether prosecutors are entitled to absolute prosecutorial immunity for supervision of and participation in a year long pre-arrest and pre-indictment investigation because the injury suffered by the criminal defendant occurred during the later criminal proceedings?
>
> 3. Whether experts who conspire with prosecutors to manufacture false evidence which inculpates the plaintiff, and who write out of court reports and render out of court opinions in furtherance of this conspiracy, are entitled to absolute immunity as witnesses because the most inculpatory of those reports and opinions are later presented in testimony to a grand jury and at a criminal trial?

Buckley v. Fitzsimmons, 90-7574, Petition at p. i.

On October 7, 1991, this Court entered the following order:

> The motion for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Burns v. Reed*, 500 U.S. ___ (1991).

112 S. Ct. 40 (1991), J.A. 101.

On remand, a majority of the original court of appeals' panel concluded that *Buckley* "is not directly governed by *Burns*," that "*Burns* reinforces *Buckley*'s approach," and reentered its original judgment. J.A. 102-9. With regard to the prosecutors' "supervision of and participation in a year long pre-arrest and pre-indictment investigation," and their "preparation for trial" by procuring the bootprint evidence, the majority stated:

> We therefore reiterate the conclusion of our initial decision: unless the act of gathering and evaluating the evidence independently violates someone's rights (as, for example, by seizing persons or things in violation of the fourth amendment), both witnesses and prosecutors are entitled to the same immunity they possess when they present the evidence in court.

J.A. 105.

Then, after stating that "*Burns* bears more strongly on Buckley's claim arising out of the press conference," because, "like the advice to the police in *Burns*, the press conference took place out of court, and was not part of preparation for trial," the majority again granted the prosecutor absolute immunity for this non-prosecutorial act because the injury "depend[ed] on the judicial decision." J.A. 105-8. Curiously, the court did carve out a narrow exception where a prosecutor "actually arrested" a plaintiff, and remanded on this issue to "examine whether the persons who arrested the plaintiff lacked probable cause." J.A. 109.[6] Judge Fairchild broadened his dissent to include the prosecutors' investigative acts, stating:

> Plaintiff claims, however, that Mr. Fitzsimmons played a very aggressive role in seeking favorable expert evidence linking the incriminating boot print to plaintiff, and in "supervision of and participation in a year long pre-arrest and pre-indictment investigation." I am unable to conclude as a matter of law that this alleged conduct falls on the side of the line to which the *Burns* Court ascribed absolute immunity.

J.A. 110.

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[6] Additionally the court declined to consider petitioner's *Paul v. Davis*, 424 U.S. 693 (1976), argument on the prosecutorial publicity question, because petitioner purportedly did not preserve it in his original certiorari petition. J.A. 105-6.

SUMMARY OF ARGUMENT

Since the express language of 42 U.S.C. §1983 admits of no immunities, the grant of absolute prosecutorial immunity, like other absolute immunities, is the exception rather than the rule, and should be granted only if the particular function at issue was immunized at common law at the time the statute was enacted *and* overriding considerations of public policy justify such immunity.

Petitioner has alleged that respondent-prosecutors supervised and participated in a year long pre-arrest and pre-indictment investigation which included the manufacture of evidence and the coercion of witnesses; conducted a prejudicial and defamatory publicity campaign which included a press conference held when petitioner was charged; ordered petitioner's arrest and imprisonment and continued that arrest and imprisonment after the jury hung and an admitted child killer admitted he committed the crime; and thereafter attempted to manufacture additional evidence. These acts are more normally performed by police investigators and police officers, are remote in time and place from the judicial process, and are essentially investigative rather than prosecutorial. Similarly, the public statements are clearly administrative rather than prosecutorial, as they are in no way necessary to, or connected with, the judicial process, and can as easily be performed by non-prosecutorial personnel. This allocation of respondents' acts is fully supported by this Court's recent decision in *Burns v. Reed*, 111 S. Ct. 1934 (1991), and is consistent with the rationale previously set forth in *Imbler v. Pachtman*, 424 U.S. 409 (1975).

In *Imbler*, this Court relied upon common law and public policy considerations in granting a prosecutor absolute immunity for conduct intimately associated with

the judicial process. At common law, investigative and administrative acts, such as those alleged by petitioner, were not afforded absolute immunity. Furthermore, policy considerations in favor of immunity for such acts are far from "overriding" while the need for compensation and deterrence militates decisively against absolute immunity. The alternative methods of deterrence relied upon by *Imbler* – criminal prosecution, professional discipline, and corrective judicial action within criminal proceedings – have all been shown to be woefully inadequate. Moreover, this Court's intervening decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), has, by removing the subjective prong of the qualified immunity test, eliminated a major policy concern of the *Imbler* Court, since qualified immunity now provides a prosecutor adequate protection from unmeritorious suits. Additionally, the public policy considerations which support the protection of a prosecutor's prosecutorial functions are not applicable to investigative and administrative acts such as those alleged against respondents.

The majority below created, from whole cloth, an injury test which circumvents the principles enunciated in *Imbler* and the holding in *Burns*. This injury test – that respondent is entitled to absolute immunity if his injury "flows from" the judicial process, or if petitioner's injury is incomplete at the time the judicial process is initiated – is a novel and radical extension of absolute immunity, completely unsupported by the common law, and in direct contradiction to the policy considerations discussed above. Moreover, it is unworkable, as is graphically demonstrated when the test is applied to the facts in *Burns*, or the facts here.

Additionally, petitioner has alleged that respondents' decision to prosecute and reprosecute was malicious and without probable cause. While the *Imbler* decision can be read to grant absolute immunity for such decisions, petitioner urges this Court to limit *Imbler* to those prosecutorial acts which take place in court. A close examination of the common law in 1871 establishes that prosecutors were entitled only to qualified immunity for their decisions to maliciously prosecute. Furthermore, the intervening decision in *Harlow*, the ineffectiveness of existing forms of deterrence, and the fact that such prosecutorial decisions do not directly implicate judicial proceedings, support a modification of *Imbler* which would afford prosecutors only qualified immunity for such decisions. Alternatively, if this Court declines to make this general modification, petitioner urges that it apply the rationale of Justice White's concurrence in *Imbler*, and hold that prosecutors are not entitled to absolute immunity for their prosecutorial decisions when there is an independent allegation that they withheld crucial exculpatory evidence from the grand jury, the court, or the defense.

ARGUMENT

1. RESPONDENTS' SUPERVISION OF, AND PARTICIPATION IN, A YEAR LONG PRE-ARREST AND PRE-INDICTMENT INVESTIGATION, THEIR FABRICATION OF EVIDENCE AND COERCION OF WITNESSES, AND THEIR OUT-OF-COURT PUBLIC STATEMENTS, WHICH CAUSED PETITIONER TO BE FALSELY ARRESTED AND IMPRISONED, ARE NOT ENTITLED TO ABSOLUTE IMMUNITY.

42 U.S.C. §1983 makes liable every person who, while acting under color of state law, deprives another of his

constitutional rights. The statute itself contains no limitation on the class of persons or type of conduct subject to liability, but this Court has previously held that the statute must be read against the background of immunities and defenses in effect at the time of its enactment in 1871. *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Imbler v. Pachtman*, 424 U.S. 409 (1975). Only if such immunities or defenses for the particular function at issue were recognized at common law, and, in addition, only if absolute immunity "is justified by overriding considerations of public policy," *Forrester v. White*, 484 U.S. 219, 224 (1987), have respondents met their burden of establishing absolute immunity. To be recognized as an exemption from §1983 liability, absolute immunity must be "so firmly rooted in the common law and supported by such strong policy reasons that the Court has been unwilling to infer that Congress meant to abolish (it) in enacting 42 U.S.C. §1983." *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring in judgment).

The existence at common law of the particular immunity in question is a precondition to the recognition of such immunity under §1983. *Tower v. Glover*, 467 U.S. 914, 922-23 (1983); *Malley v. Briggs*, 475 U.S. 335, 339-40 (1985); *Burns v. Reed*, 111 S. Ct. 1934, 1945-46 (1991) (Scalia, J., concurring in part and dissenting in part). Courts "do not have a license to establish immunities from §1983 in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. at 922-23. "(O)ur role is to interpret the intent of Congress in enacting §1983, not to make a freewheeling policy choice, and we are guided in interpreting Congress' intent by the common-law tradition." *Malley v. Briggs*, 475 U.S. at 342. Because there was no common law immunity for prosecutors who engaged in

investigative or administrative acts, including fabrication of evidence and out-of-court defamatory statements which prejudiced a fair trial, and, further, because public policy does not support absolute immunity for such acts, immunity should be denied here.

A. There was no immunity at common law for a prosecutor's investigatory or administrative acts.

Neither the Seventh Circuit nor respondents have identified any authority establishing that investigative or administrative acts by a prosecutor, including the fabrication of evidence and the making of out-of-court defamatory statements, were entitled to absolute immunity at common law. In the absence of such authority, respondents' request for absolute immunity must be denied.

In determining absolute immunity, it is the function performed by the official, not the status of the official *per se*, that is determinative, and thus the Court "examine(s) the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester v. White*, 484 U.S. at 224. "(T)he official seeking absolute immunity bears the burden of showing that such immunity is justified for the *function* in question." *Burns v. Reed*, 111 S. Ct. 1934, 1939 (emphasis added). Respondents' status as prosecutors thus affords them no special dispensation to violate petitioner's constitutional rights and remain free from damages liability. It is only if the contested function was entitled to absolute immunity under common law in 1871 that such immunity should be recognized now.

Absolute immunity at common law was "exceedingly rare." *Burns v. Reed*, at 1947 (Scalia, J., concurring and

dissenting). It extended to judges for their judicial, but not administrative, acts, *Forrester v. White*, 484 U.S. 219, 227-28 (1987); *Bradley v. Fisher*, 13 Wall. 335 (1872); *Ex parte Virginia*, 100 U.S. 339 (1880); *Burns v. Reed*, at 1946 (Scalia, J., concurring and dissenting); and to participants in the judicial process to protect them from defamation liability for "anything said or written in the course of any judicial proceeding." E. Scalia, *Police Witness Immunity Under §1983*, 56 U. Chi. L. Rev. 1433, 1434 (1989). For lawyers this immunity covered "any courtroom statement relevant to the subject matter of the proceeding . . . (and) extend(ed) to their briefs and pleadings as well." *Imbler v. Pachtman*, 424 U.S. at 426 n. 23; *see also, Hoar v. Wood*, 44 Mass. 193 (1841); *White v. Nicholls*, 3 How. 266, 287 (1845).

This Court has concluded that prosecutors were immune at common law from malicious prosecution suits (but see post at 40-48), but has noted that absolute immunity did not protect a prosecutor from liability for false arrest. *Imbler v. Pachtman*, at 441 n. 6 (White, J., concurring in judgment) (citing 1 Harper & James, *The Law of Torts* §3:17 and 3:18 (1956), and *Schneider v. Shepherd*, 192 Mich. 82, 158 N.W. 182 (1916) [prosecutor liable for his conduct in directing an investigation that led to the arrest of the plaintiff]). There is no pre-1871 authority granting immunity to public prosecutors for anything other than their activities before a judicial tribunal or, possibly, the bringing of a criminal proceeding, and no authority granting immunity for the fabrication of testimony or out-of-court statements. Thus, at common law respondents would not have been entitled to absolute immunity for the acts alleged against them here, because such conduct did not fit within the small category of acts which were cloaked with absolute immunity.

B. Policy does not favor absolute immunity here.

In addition to its lack of historical basis in the common law, the absolute immunity sought by respondents here is not warranted by policy. Even if an immunity were recognized at common law, it should not be incorporated into §1983 if "§1983's history or purpose nonetheless counsel against recognizing the same immunity in §1983 actions." *Tower v. Glover,* 467 U.S. at 920. "(W)hile we look to the common law for guidance, we do not assume that Congress intended to incorporate every common law immunity into §1983 in unaltered form." *Malley v. Briggs,* 475 U.S. 335, 340 (1985). Absolute immunity should apply in §1983 actions only if the "officials who seek exemption from personal liability (meet) the(ir) burden of showing that such an exemption is justified by overriding considerations of public policy." *Forrester v. White,* 484 U.S. at 224. Because respondents have failed to demonstrate that public policy justifies absolute immunity for a press conference, fabrication of evidence, and other related investigative or administrative acts, such immunity should be denied here.

As was stated in *Burns,* this Court "completely reformulated qualified immunity" in *Harlow v. Fitzgerald,* 457 U.S. 800 (1982),

> replacing the common-law subjective standard with an objective standard that allows liability only where the official violates clearly established statutory or constitutional rights of which a reasonable person would have known.

Burns, at 1944 n. 8. This radical change was designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary

judgment." *Id.,* quoting *Malley v. Briggs,* at 341. This standard, enunciated after *Imbler,* "satisfies one of the principal concerns underlying our recognition of absolute immunity (in *Imbler*)," *Burns* at 1944 n. 8, referring to *Imbler,* 424 U.S. at 419 n. 13. This concern, as defined in *Imbler,* was that the subjective motivation and intent component of qualified immunity could not normally be resolved until after the evidence was presented at trial, and its removal by this Court's decision in *Harlow* militates strongly against unnecessarily extending the scope of the traditional concept of absolute immunity. *See, Forrester v. White,* at 224. Also, since *Imbler,* government officials have been afforded the right to immediately appeal the denial of qualified immunity, *Mitchell v. Forsyth,* 472 U.S. 511 (1985). The public policy concerns articulated in *Imbler* in support of absolute prosecutorial immunity must therefore also be reformulated in light of the extremely protective qualified immunity to which respondents are now entitled.

Imbler articulated several policy concerns in favor of granting absolute immunity to prosecutors for actions intimately associated with the judicial process. The Court was concerned that litigation concerning the prosecutor's initiation and conduct of a criminal proceeding would constrain the prosecutor's decision making in that area and affect his conduct of prosecutions, and saw this as conflicting with the public's interest in a prosecutor having wide discretion in how he tries his case, and in allowing a jury to decide between conflicting evidence. *Imbler* at 424, 426 and 430; *Burns* at 1943. Further, it feared that civil proceedings would lead to relitigation of the entire criminal case and, in effect, impose additional review on top of that already afforded by criminal

appeals and post conviction proceedings (*Imbler* at 425), and suggested that denial of absolute immunity might lead trial and appellate judges to ignore meritorious objections by defendants to the fairness of a trial, since recognition of such errors would lead to a prosecutor being liable for damages. *Id.* at 427.

None of these policy considerations warrant absolute immunity for respondents' involvement in the pre-arrest investigation, fabrication of evidence, interrogation of witnesses, arrest and imprisonment of petitioner, or their out-of-court statements. Here, the creation of false evidence began nearly a year before petitioner was indicted, let alone tried, and apparently before any firm decision to prosecute petitioner had been made. Moreover, petitioner's challenge to the false evidence related primarily to the manufacture of the evidence, not its use against him in the criminal trial. Thus, litigation of this claim would not question or impinge upon the prosecutors' decision to prosecute petitioner or introduce the evidence before the grand jury or at trial, but rather respondents' role at an earlier period of time when they were acting as, and with, police investigators.

If the investigating prosecutors and the prosecuting prosecutors were different people, then the distinction in functions would appear brighter, but the legal ramifications would be conceptually identical. In that circumstance, the prosecuting prosecutors might well be immune, under *Imbler*, for their role in initiating and conducting the prosecution because litigation might invade the sphere of trial strategy. But litigation against the investigating prosecutors would have no such effect. The wrongdoing of those prosecutors was complete prior to the prosecution, and the fact that a major part of the

injury was sustained through use of the manufactured evidence by another has never been held to protect the investigator from liability. *See, e.g., Malley v. Briggs*, at 340-41; *Randall v. Henry*, 5 Stew. and Pott. 367, 377 (Ala. 1834). Under this Court's functional analysis it is irrelevant that the investigating prosecutor and the prosecuting prosecutor were the same, since it is the duties being performed, not the personalities involved, which determines whether the act is immunized.

> Moreover, *Imbler's* concern about vexatious litigation, is not merely a generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process . . . . Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation . . . . That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation inducing conduct.

Burns, at 1943 (citations omitted, emphasis in original). Here, the litigation on this claim would concentrate on respondents' role in the investigation, not their subsequent prosecution of petitioner in court, and such litigation would not "harass or intimidate" the judicial process. Neither would litigation on this claim constitute relitigation of the criminal trial since the contested issues occurred well before the trial was underway.

Moreover, *Imbler's* concern that a criminal court judge would be loath to recognize a prosecutor's errors for fear of opening him to damages liability is not a strong argument. A judge's determination in the criminal proceeding would not necessarily be admissible in a subsequent civil suit, *see, Schultz v. Thomas*, 832 F.2d 108 (7th

Cir. 1987), and recognition of prosecutorial error by a criminal court would in no way ensure a victory by a civil plaintiff. In addition, judges' decisions routinely have extensive impact on officials' liabilities but judges are expected to objectively apply the relevant law without fear of the consequences.

Imbler also suggested that absolute immunity was warranted because there are several checks other than civil litigation to prevent prosecutorial abuses. But as *Burns* noted, the type of conduct challenged here – out of court activities by a prosecutor, some of which were prior to the initiation of the prosecution – will not necessarily be restrained by the judicial process, especially if petitioner is not taken to trial. Yet if immunity depends on the functions being performed it cannot be controlled by the fortuity of prosecution, since that would replace the "functions" test by a standard which looked to future events. Moreover, such a test would encourage unwarranted prosecutions since a prosecutor who had engaged in wrongdoing could avoid all civil liability by causing the victim to be criminally prosecuted.

Since the conduct challenged here did not occur before a judge or any judicial body, it was unlikely to be subject to judicial controls. By the time the evidence could be tested before a trier of fact, petitioner had already suffered imprisonment for almost a year. Moreover, the detention of petitioner for over two years *after* his first trial was never litigated in the criminal proceeding. Petitioner remained incarcerated while respondents' manufactured case crumbled around them, with the FBI confirming that his boots did not match the print on the door and an admitted child murderer confessing to the crime and asserting petitioner had nothing to do with it.

Respondents refused to voluntarily dismiss the charges or support petitioner's release on affordable bail, but when forced to retrial, they finally conceded that they had no case by dropping all charges against petitioner.

Respondents' defamation of petitioner, and their attempts to deny him fair hearings and trial, are likewise disconnected from the judicial phase of the criminal process and thus are not entitled to absolute immunity. Litigation on this issue would not concentrate on respondents' trial strategy or their initiation of the prosecution, and thus would not affect the prosecutor's role in judicial proceedings. Moreover, holding press conferences, making public statements, and attempting to fan the flames of community prejudice against petitioner are not a part of respondents' statutory duties, nor are they functions necessary to ensure that crimes are vigorously prosecuted. *See*, Ill. Rev. Stat. Ch. 34 §3-9005. Prosecutors have no special powers or expertise with regard to out-of-court statements, and such functions could, if thought necessary to inform the populace of a criminal indictment, be undertaken by a press spokesperson or other non-prosecutor. To describe out-of-court statements by a prosecutor as being "intimately associated with the judicial process" strains language and logic beyond the breaking point.

In *Imbler*, this Court rightly focused on the important public policy question of whether the grant of absolute immunity would undermine an important purpose of 42 U.S.C. §1983 – the deterrence of unconstitutional conduct by government officials; *Imbler*, 424 U.S. at 429; *see also*, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961); *Monell v. Department of Family Services*, 438 U.S. 678 (1978); *Owen v. City of Independence*, 445 U.S. 622 (1980). In *Imbler*, the Court

determined that sufficient deterrence was available for the acts at issue there in the correctives of the criminal process itself, professional discipline, and criminal prosecutions, particularly prosecutions under 18 U.S.C. §241 and 242. In the seventeen years since *Imbler* was decided, it has become all too obvious that these methods of deterrence are ineffectual in deterring prosecutorial misconduct, and give no support to an award of absolute immunity to these respondents.

Commentators who have studied prosecutorial misconduct and its deterrence have noted both how widespread it has become and how difficult it is to control. As early as 1972 Albert Alschuler commented that "the academic commentators have almost universally bemoaned its frequency." Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972). This frequency has continued to the present, despite numerous cases where prosecutorial misconduct has resulted in the reversal of a defendant's conviction, and has led one recent commentator to refer to it as an "epidemic," and another to state that "flagrant prosecutorial misconduct appears to be increasing." Genson and Martin, *The Epidemic of Prosecutorial Courtroom Misconduct In Illinois: Is it Time to Start Prosecuting the Prosecutors?* 19 Loyola Univ. of Chi. L.J. 39 (1987); Steele, *Unethical Prosecutions and Inadequate Discipline*, 38 Sw. L.J. 965, 968, 979 (1984); *See also*, Gershman, *Prosecutorial Misconduct*, §1.8(d) (Clark Boardman, 1992). The continued frequency of prosecutorial misconduct from 1975 to the present underscores that the existing forms of deterrence are woefully ineffective.

While all too frequent reversals on appeal due to prosecutorial misconduct apparently do not deter prosecutors, deterrence by discipline and prosecution is

ineffectual because it is so infrequently imposed. Steele, in his study of prosecutorial misconduct cases, found that such misconduct "provokes little or no outrage among the legal profession and very rarely results in any disciplinary investigation or sanction." 38 Sw. L.J. at 979. This finding was reaffirmed in 1992 by Gershman who stated that effective discipline by bar associations is "so rare as to make its use virtually a nullity . . . . With the exception of a handful of cases . . . effective disciplinary action is an illusion."[7] Prosecutorial Misconduct §1.8(d).

Similarly, prosecution of prosecutors under 18 U.S.C. §241 and 242, is so rarely, if ever, attempted that petitioner has been unable to find a single reported case in which a prosecutor has been so charged. In Chicago, petitioner's counsel has been actively litigating official misconduct cases for the past 23 years, and knows of no such prosecution despite several egregious cases which invited such action.[8] Additionally prosecutions of public

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[7] Several reasons are advanced for this phenomenon, including the reluctance of defendants, defense lawyers, and judges to report prosecutors; underfunding, understaffing, and general ineffectiveness of the Bar disciplinary agencies; and the refusal to permit bar associations to discipline prosecutors. *See*: Steele, 38 Sw. L.J. at 967-8, 980-82; *Simpson v. Alabama*, 311 So. 2d 307 (Ala. 1975); *Snyders Case*, 301 Pa. 276 (1980).

[8] For example, in *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), the prosecutor was charged with planning a raid in which two Black Panthers were murdered, then covering up these actions, by, *inter alia*, falsifying evidence and maliciously prosecuting the survivors of the raid. The federal prosecutors refused to seek a federal indictment under 18 U.S.C. §241 and 242, after a grand jury heard several months of evidence. In *Palmer v. Chicago*, 562 F. Supp. 1067, 1071 (N.D. Ill. 1983) rev'd on other grds., 755 F.2d 560 (7th Cir. 1985), prosecutors were aware of a longstanding police policy and practice of secreting excul-

officials under 18 U.S.C. §241 and 242 are both rare and seldom successful, a reality which has led former federal prosecutor and current Second Circuit Court of Appeals Judge Jon Newman to conclude that "criminal law is often an incomplete and inadequate instrument for adjusting the competing demands of law enforcement and the rights of citizens," because of the reasonable doubt standard of proof and "the inevitable reluctance of the ordinary citizen to brand a law enforcement officer as a criminal . . . even if they think he acted improperly." As a result, Judge Newman proposed in testimony to Congress a new civil rights damage remedy, free of immunity defenses, which would be prosecuted by the government. Newman, *How to Protect Other Rodney Kings,* N.Y. Times, Friday, May 1, 1992, at 35; N.Y. Times, May 8, 1992, at 30; Hous. Chron. May 6, 1992, at 7.

The public policy concerns of the *Imbler* court in allowing prosecutors to prosecute free from the burden of civil litigation do not support the grant of absolute immunity for the functions performed by respondent prosecutors here. On the other hand, the public policy of deterring unconstitutional conduct weighs heavily in favor of petitioner, and supports denial of absolute immunity.

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patory evidence in "street files" which were not produced to the defendant in criminal discovery; in *People v. Wilson,* 116 Ill. 2d 29 (1987), a prosecutor who was told by a police torture victim that he was being tortured did nothing to stop or report it, but rather took an inculpatory statement which was the product of that torture; and in *Jones v. City of Chicago,* 856 F.2d 985, 989-90, 992 (7th Cir. 1988), a prosecutor participated in a "common venture to railroad" the plaintiff and to cover up those actions. In none of these cases was there a federal criminal prosecution.

C. Respondents' acts are functionally investigative and administrative, rather then prosecutorial, in nature

Under *Imbler* and *Burns,* respondents' acts, and the course of conduct they reflected, were functionally investigative and administrative, rather than prosecutorial, and were not "intimately associated with the judicial process." *Imbler,* 424 U.S. at 430; *Burns* 111 S. Ct. at 1942. The pre-indictment investigative acts were not only remote in time and place from the judicial process, but were also functions that are normally and primarily performed by police officials, particularly before an arrest has been made or an indictment obtained. Police investigators, rather than prosecutors, normally conduct the interrogations of suspects and witnesses, and work with a crime laboratory's forensic personnel to analyze, identify, and match physical evidence, whether it be blood, ballistics, fingerprints, or bootprints.

This Court's decision in *Burns* also clearly demonstrates that respondents' conduct and acts in interrogating suspects and witnesses, and in obtaining and/or manufacturing evidence, was investigative in nature. In *Burns,* the prosecutor was denied absolute immunity for giving advice to police officers concerning their interrogation of the plaintiff, and for the procurement and manufacture of evidence. In *Burns* the manufactured evidence was a hypnotized "confession," while in *Buckley* it is a bootprint "match." If giving advice concerning such acts is investigative, as this Court held in *Burns,* then participating in the acts themselves must also be investigative and not entitled to absolute immunity.[9]

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[9] For other cases which hold that a prosecutor's role in obtaining evidence is investigatory, see, *Mitchell v. Forsyth,* 472

It is again instructive in analyzing the nature of the respondent's function to consider the circumstance where the prosecutors who manufactured the evidence and conducted the coercive interrogations were different from those who presented the evidence obtained in court. In that analogous circumstance, it becomes even more obvious that the conduct of the first set of prosecutors is essentially investigative in nature, and that such conduct is entirely miscast as a normal or necessary part of a prosecutor's preparation for trial, as the court below has done.

Respondents' prejudicial and defamatory out of court public statements and publicity campaign are clearly administrative, rather than prosecutorial, acts. They are remote from, and unnecessary to, the judicial process, and practically every court which has considered the question has determined them to be non-prosecutorial in nature.[10]

U.S. 511 (1985); *Barbera v. Smith*, 836 F.2d 96 (2d Cir. 1987), which held that the function of *acquiring* evidence jointly with law enforcement officials prior to arrest and prosecution, is an investigative function, which does not require absolute immunity; *Hampton v. Hanrahan*, 484 F.2d 601 (7th Cir. 1973); *Briggs v. Goodwin*, 569 F.2d 10, 23 (D.C. Cir. 1977), cert. den., 98 S. Ct. 3089 (1978); *Forsyth v. Kleindeinst*, 599 F.2d 1203, 1215 (3rd Cir. 1979); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974); *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); and *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989).

[10] *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983); *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988); *Powers v. Coe*, 728 F.2d 97, 103 (2d Cir. 1984) (Plaintiff alleged a publicity campaign by prosecutors to deprive plaintiff of his right to fair trial by disclosing secret evidence that had been presented to the grand jury; the Second Circuit, finding that a prosecutor's dealings with the press were administrative, held that there was no

Similarly, participating in petitioner's arrest and imprisonment by directing the arresting officers to arrest and imprison him despite the absence of probable cause, is an integral part of the police function for which police officers have repeatedly been afforded only qualified immunity. *Pierson v. Ray*, 386 U.S. 547 (1967); *Malley v. Briggs*, 475 U.S. 335. In *Imbler*, Justice White recognized in his concurring opinion that prosecutors were afforded only qualified immunity for false arrest, 424 U.S. at 441 n. 6, while in *Burns*, the prosecutor was not afforded absolute immunity for his similar, though less affirmative, participation in plaintiff's arrest. Moreover, respondents' decision to continue petitioner's arrest and imprisonment, again without probable cause, after the hung jury, Dugan's confession, and the FBI bootprint report, was a non-prosecutorial function which should be afforded only qualified immunity. In addition, the imprisonment itself continued to be caused by the manufactured false

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absolute immunity for a prosecutor's "extraneous statements to the press designed to gain unfair advantage at trial."); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) ("A prosecutor's public statements regarding criminal proceedings are not protected by absolute immunity because they are not quasi-judicial acts."); *Helstoski v. Goldstein*, 552 F.2d 564, 566 (3rd Cir. 1977) (no absolute immunity for a prosecutor's deliberate leaks to the press in investigation leading to prosecution); *Taylor v. Kavanagh*, 640 F.2d 450 (2d Cir. 1981) (no absolute immunity for distributing extraneous statements to the press); *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976) (no absolute immunity for prosecutor's public statements after a criminal charge had been dismissed); *Marrero v. City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (authorized public statements by a prosecutor, and the public interest in information concerning the affairs of government, are amply protected by qualified immunity); see also *Martin v. Merola*, 532 F.2d 193, 195-198 (2d Cir. 1975) (Lombard, J., concurring).

evidence. It was only because of this false evidence that the original arrest occurred, and the intervention of the first trial, and the hung jury, did nothing to break the causal relationship.

The acts alleged against respondents are thus investigative or administrative rather than prosecutorial. Because there was no immunity at common law for such acts, and because, even if there were, the policy concerns enunciated in *Imbler* do not support extension of absolute immunity, respondents have not met their burden of establishing that they are entitled to absolute immunity.

D. The Court of Appeals' "place of injury" test for absolute immunity contradicts this Court's decisions that immunity is determined by the function performed.

This Court has made it clear that absolute immunity for a prosecutor is determined by the function he performs, not his status as prosecutor. *Imbler* at 430; *Burns* at 1939; *see also, Forrester v. White,* at 224. The court of appeals' decision, while paying lip service to this principle, abandons it in favor of a "place of injury" test, whereby no matter what function the prosecutor is performing when he commits wrongdoing, he will be immune if the injury occasioned by the act was not complete when the judicial process was initiated, or if the injury "flowed from" the judicial process. This test, which the court of appeals recommended as a "simple demarcation," (J.A. 87) is unsupported by history or the valid policy concerns enunciated in *Imbler* and *Burns,* is a radical extension of absolute prosecutorial immunity, and constitutes precisely the type of "freewheeling policy choice" that this court condemned in *Malley v. Briggs,* 475 U.S. at 342.

The court of appeals' opinion is entirely bereft of any historical authority for its novel proposition that the place of injury determines whether an act is sufficiently prosecutorial for absolute immunity to apply. Yet, since absolute immunity is a question of statutory construction, *see, Briscoe v. LaHue,* 460 U.S. 325, 326 (1982), the existence of such immunity at the time of enactment of §1983 is a necessary condition to delimit the statute's express language. It is respondents' burden to establish the existence in 1871 of immunity for acts causing injury in the judicial process, and they have failed to do so. In fact, the evidence is that the place of injury was never a relevant concern in determining the prosecutor's immunity. *See, Imbler v. Pachtman,* at 441 n. 6 (White, J., concurring in judgment). Rather than dating from 1871, the court of appeals' test appears to be of 1990 vintage.

Moreover, the majority's expansion of absolute prosecutorial immunity runs directly contrary to this Court's admonition that absolute immunity, which is in "undeniable tension" with "the ideal of the rule of law," *Forrester v. White,* at 223, must be imposed sparingly and only where it is justified by "overriding considerations of public policy." *Id.* at 224. *Imbler* and *Burns* stressed that this standard was met only when the civil litigation concerned conduct intimately associated with the judicial process, and *Burns* pointed out that absolute immunity was not justified "for every litigation-inducing conduct." *Burns,* at 1943.

The court of appeals' test leads to incongruous results. If a prosecutor helped create false evidence while he participated in an investigation, and then caused the target to be arrested without presenting that false evidence to a judge or grand jury, he could be liable for false

arrest.[11] But the prosecutor could immunize himself from civil liability by obtaining an arrest warrant or indictment based on the same false evidence, so that the arrest would "flow" from the judicial process. By compounding his wrongdoing and presenting knowingly perjured testimony to a judge or grand jury, the prosecutor could absolve himself of civil liability. The test thus not only wrongly immunizes investigative conduct, but also encourages perjury and subornation of perjury by prosecutors. This result is also in direct conflict with the holding of *Malley v. Briggs* that issuance of a warrant does not break the causal chain between application for the warrant and arrest. 475 U.S. at 344 n. 6.

The place of injury test also fails to satisfy the policy concerns enunciated in *Imbler* and *Burns*. Where a prosecutor's investigative or administrative acts cause injury in the judicial process, the focus of inquiry in civil litigation will be the wrongdoing itself rather than its effect. To the extent that causation of damages becomes an issue – e.g. the prosecutor claims that the false evidence was not a proximate cause of imprisonment since there was sufficient untainted evidence to justify the arrest and imprisonment of the criminal defendant – this question will focus on an objective appraisal of the available evidence and whether the untainted evidence was sufficient to amount to probable cause. This will not entail inquiry into the prosecutor's subjective motivation in presenting the evidence before a judicial proceeding, his trial strategy, or how he carried out his duties as prosecutor, since

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[11] This was the initial situation in *Burns*. Subsequently, however, the plaintiff apparently was released, then, after two separate probable cause determinations, rearrested, and held for four months. *Burns*, 111 S. Ct. at 1937; *Burns v. Reed*, 894 F.2d 949, 950-952 (7th Cir. 1989).

probable cause is an objective test. *Anderson v. Creighton*, 483 U.S. 635 (1987). Thus, litigation concerning whether wrongdoing outside the judicial process caused injury inside it will not interfere with the judicial process.

Moreover, the fact that injury has occurred within the judicial process has never been held sufficient to deny recovery. In *Tower v. Glover*, 467 U.S. 914 (1983), the court upheld the §1983 suit of a criminal defendant against his former public defender for damages caused by his conviction which allegedly resulted from a conspiracy between the defender, the prosecutor and judges. *Malley v. Briggs* upheld the possibility of recovery for an arrest which had occurred after a warrant had been issued, while in *Burns*, the most serious of plaintiff's injuries occurred after search *and* arrest warrants were issued.

Denying absolute immunity to a prosecutor whose investigative or administrative acts cause injury within the judicial process will not unduly hamper prosecutors in the discharge of their obligations. A prosecutor's most important task is the litigation of cases before judicial bodies. In carrying out that task he takes actions that are closely associated with the judicial process and which are, under *Imbler*, entitled to absolute immunity. When a prosecutor engages in other tasks such as investigation, public comment, or providing legal advice to government officials, he is doing things that need not be done by a prosecutor and which are not closely associated with the judicial process. Investigation is routinely assigned to police officers, public statements may be made by a spokesperson, and legal advice is often given by private attorneys retained by a municipality. On the other hand, the representation of the government's interest in prosecuting crime is usually done only by a prosecutor. For actions other than those intimately associated with the

judicial process, a prosecutor is entitled to qualified immunity which "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns*, at 1944, quoting *Malley* at 341. Although denial of absolute immunity may cause a prosecutor to think more carefully about the constitutionality of his actions, this is salutary since "[w]here an official could be expected to know that his conduct would violate statutory or constitutional rights he *should* be made to hesitate." *Burns*, at 1944, quoting *Mitchell v. Forsyth* at 524, and *Harlow*, at 819.

The injury test also presents substantial practical and interpretational problems which further complicate the question of absolute prosecutorial immunity. Several of these problems are presented in this case. For example, how is it determined if the injury "flows from" the judicial proceeding? Petitioner's arrest and imprisonment here can legitimately be considered to have happened outside the judicial process and to have been caused by – and therefore flow from – non-judicial factors, including the manufacture of evidence, coercive interrogations, the prosecutor's illicit political motivation, the false and defamatory press conference, the decision to arrest and imprison and/or the actual arrest and imprisonment – rather than by the grand jury indictment itself. The judicial process – and particularly the grand jury indictment – was less important to the arrest and imprisonment than was the out of court investigative conduct alleged above.[12]

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[12] Similarly, if the portion of Seventh Circuit's injury test which requires that the injury be complete before the judicial process begins were applied to *Burns*, several different results could be reached. Since Burns was initially arrested before there was a judicial determination of probable cause, the injury test could be applied in such a way as to conclude that the injury occurred before judicial intervention, and therefore the prosecutor's conduct should not be afforded absolute immunity. However, subsequently plaintiff was apparently rearrested, pursuant to a judicially issued arrest warrant, and suffered the most serious of her arrest and imprisonment injuries. Does the "injury test" require immunization of the entire arrest and imprisonment, should they be considered two separate injuries, divided by judicial intervention, one actionable and one not, or should the prosecutors be exposed to liability for the entire injury, because the original arrest and imprisonment took place before judicial intervention?

A related problem is posed by petitioner's publicity "injuries." Petitioner clearly alleges several components to this injury, some of which occur within the judicial process, while another happens outside. Specifically, petitioner alleges that the publicity defamed him – a component of his injury which has nothing to do with the judicial process. While this component by itself may not rise to a constitutional violation under the *Paul v. Davis*, 424 U.S. 693 (1976), "defamation plus" test, it does if it is viewed together with the injuries suffered within the judicial process. Even if components of the injuries are immunized by their locus, should they not be considered in determining the "defamation plus" test, much the same way that an immunized judge provides color of law to an otherwise private §1983 conspiracy by his immunized acts? *See, Dennis v. Sparks*, 449 U.S. 24 (1980). And if the injury is considered as a single injury, does the in court prejudice immunize the entire injury, does the defamation expose the prejudice to liability, or is the defamation actionable while the "plus" is not?

That the prosecutor's investigative or administrative acts may in some way be related to, or affect, either the decision to prosecute or the prosecution itself, and thus cause some injury within the judicial process, does not entitle it to absolute immunity. *Burns* at 1944; *Mitchell v. Forsyth*, at 521. If immunity were expanded that widely, almost any act by the prosecutor would be absolutely immune and the functional test of *Imbler* and *Burns* would be a dead letter. Prosecutors generally perform tasks that are related to a prosecution and which eventually cause results in the judicial process. That relationship in itself does not entitle the acts to absolute immunity, which is reserved only for acts intimately associated with the judicial process.

2. RESPONDENTS' MALICIOUS DECISION TO SEEK AN INDICTMENT AGAINST PETITIONER IS NOT ENTITLED TO ABSOLUTE IMMUNITY.

In his first point petitioner argued, *inter alia*, that respondents were not absolutely immune for investigative acts, including the manufacture of evidence, which caused his false arrest and imprisonment, and that the fact that this imprisonment occurred in the course of a judicial proceeding did not change this result. In this argument petitioner contends that he should additionally be permitted to recover against respondents for their malicious decision to indict, prosecute and reprosecute him.

A. Prosecutorial immunity from all liability for malicious prosecution suits was not well established in 1871.

At common law, the well established rule was that a person who caused another to be indicted and prosecuted

was liable for malicious prosecution if there was no probable cause, the prosecutor acted maliciously, and the prior prosecution was determined in favor of the current plaintiff. *Dinsman v. Wilkes*, 12 How. 390, 402 (1852); *Randall v. Henry*, 5 Stew. & Pott. 367 (Ala. 1834). The cause of action was deliberately made difficult to maintain and win because of the public policy in favor of encouraging persons to prosecute offenders who would otherwise endanger the order and peace of the community. E. Scalia, *Police Witness Immunity*, at 1441-2; M. Newell, *Malicious Prosecution*, 21-22 (1892); F. Harper, *Malicious Prosecution*, 15 Tex. L. Rev. 157, 165-70 (1937); Blackstone, 3 Com. 126. If, however, the plaintiff could satisfy his heavy burden he would "ordinarily be handsomely rewarded . . . (for) the outrageous character of the defendant's conduct." F. Harper, *Malicious Prosecution*, at 170.

Most of the early malicious prosecution cases involve private parties, and make no mention of any distinction between the liability of a private, as opposed to a public, prosecutor. Private attorneys who prosecuted quasi-criminal actions on behalf of their clients, which led to the imprisonment of the defendant, were liable for malicious prosecution if they acted maliciously and without probable cause. *Burnap v. Marsh*, 13 Ill. 535 (1852). When the potential liability of a public prosecutor was discussed by a court, it was presumed that he was *not* entitled to absolute immunity and that the standard test – malicious indictment without probable cause – applied. *Parker v. Huntington and another*, 2 Gray 124 (Mass. 1854).

A nineteenth century treatise on malicious prosecution, M. Newell, *Malicious Prosecution* (1892), contains an extensive discussion of the immunity of judges, which makes it clear that they are immune even if they act

maliciously, *id.* at 125, but states that quasi-judicial officers are not entitled to such immunity and may be liable if they do not act honestly. Newell described the functions of a quasi-judicial officer as "those which lie midway between the judicial and ministerial ones . . . When the law . . . commits to any officer the duty of looking into the facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed quasi-judicial." *Id.* at 166. While a quasi-judicial officer could not be liable "for the honest exercise of his judgment, however erroneous or misguided that judgment may be," there was no provision for absolute immunity for such an officer who performed his duties dishonestly or maliciously. *Id.* at 166. The treatise provided that prosecutors were liable if there was malice and an absence of probable cause, with no distinction made between public and private prosecutors; the section on defendants contained no exemption for public prosecutors, *id.* at 367-68; and the defendant's status as a public prosecutor was not listed as a defense. *Id.* at 430-449. Thus, a major nineteenth century treatise on malicious prosecution indicated public prosecutors were not entitled to absolute immunity at common law.

The first case to hold that prosecutors were absolutely immune was *Griffith v. Slinkard*, 146 Ind. 117 (1896), a case decided well after the enactment of §1983. There, the Indiana court, relying on its earlier dicta in *State v. Henning*, 33 Ind. 189 (1870), which held, based on its interpretation of the Indiana constitution, that a prosecutor was a judicial officer for the purpose of an indictment for bribery,[13] granted a prosecutor absolute immunity on

[13] The holding was unnecessary to the decision in *Henning* since the court dismissed the case based on improper venue.

that basis. *Griffith* contained no discussion of any common law basis for such immunity, but rather based it on its interpretation of the Indiana Constitution.[14] *Griffith* thus provides no support whatsoever for the argument that absolute immunity for prosecutors was recognized at common law. Indeed, quite the opposite is true, since if there had been such a doctrine, the Indiana court would surely have cited it instead of, or in addition to, its argument based on the Indiana constitution.

In 1897 the courts of Kentucky indicated that a city attorney could be liable for a malicious prosecution. *Arnold v. Hubble*, 38 S.W. 1041, 18 Ky Law Rep. 947 (1897). Subsequently, the Supreme Court of Minnesota held that the chairman of a board of supervisors, whose official duties included the prosecution of persons violating statutes relating to obstruction of highways, was not absolutely immune from malicious prosecution when he prosecuted in his official capacity. *Skeffington v. Eylward*, 97 Minn. 244, 248 (1906). The reasoning of *Griffith v. Slinkard* was disapproved in *Leong Yau v. Carden*, 23 Haw. 362 (1916), where the court, citing *Newell, supra*, held that a prosecutor was a quasi-judicial, not judicial, officer, who was not liable for an honest mistake or error of judgment in instituting a criminal proceeding, but who was liable if he acted maliciously and without probable cause. *Id.* at 369. Subsequently, the New York Court of Appeals upheld a malicious prosection suit against a magistrate acting in the role of a prosecutor, though without discussing immunity. *Dean v. Kochendorfer*, 237 N.Y. 384 (1924). There are several later cases which do

[14] The current Indiana Constitution provides in its judicial article for the election of prosecuting attorneys. Ind. Const. Art. VII §16.

grant prosecutors absolute immunity for malicious prosecution, e.g. *Yaselli v. Goff*, 12 F.2d 396 (2d Cir.), aff'd, 275 U.S. 503 (1927); *Imbler v. Pachtman*, 424 U.S. at 421-4, but none cite any pre-1871 authority for their holdings.

Thus, the holding of *Imbler* that "the common-law rule of immunity (for prosecutors) is thus well settled" *id.* at 424, is not well grounded in history, and has recently been questioned by Justice Scalia's concurring and dissenting opinion in *Burns*.[15] This opinion identifies three relevant types of immunity recognized in 1871 – judicial, quasi-judicial and defamation – and notes that prosecutorial functions would have been considered quasi-judicial and entitled to qualified, not absolute, immunity. A prosecutor would not have been entitled to judicial immunity since he did not adjudicate rights, *id.* at 1949, but would be entitled to immunity from defamation suits for statements made in the course of court proceedings. *Id.* at 1947. However, a malicious decision to initiate a search warrant proceeding would have been actionable against a prosecutor as a form of malicious prosecution. *Id.* at 1949. The majority opinion in *Burns* did not disagree with this opinion's conclusions, but held that the issue had not been sufficiently raised by petitioner, and noted that it was not determining whether respondent's "motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant" was entitled to absolute immunity. *Id.* at 1940.

The question is squarely presented here. Petitioner alleged respondents maliciously prosecuted him without probable cause, knowing that he was innocent, and for the purpose of deflecting blame away from them for the

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[15] This opinion was joined by Justice Blackmun and, in part, by Justice Marshall.

way they conducted their investigation, and to further respondent Fitzsimmons' political career.

B. Public policy does not support absolute immunity for a prosecutor's malicious decision to prosecute based on an improper ulterior motive.

In accordance with the concurring and dissenting opinion in *Burns*, in light of the absence of common law malicious prosecution immunity for public prosecutors in 1871, and recognizing the revolution in qualified immunity protection that has occurred since *Imbler*, this Court should now limit *Imbler* to the thrust of the conduct challenged there – the presentation of evidence in court – and restore absolute immunity to the contours that were well established in 1871. In particular, the Court should hold that a public prosecutor's malicious decision to seek an indictment, in the absence of probable cause, but with the presence of an improper ulterior motive, is actionable, and the prosecutor is limited to qualified immunity. Such a holding would be in accord with accepted canons of statutory construction, would provide redress to plaintiffs who are seriously injured by defendants who are either plainly incompetent or knowingly violate the law, yet would maintain the common law's stiff barrier to recovery, and thus avoid a rash of unmeritorious lawsuits.

This standard would not violate the policy concerns underlying *Imbler*. Since the prosecutor and his witnesses retain absolute defamation immunity for anything said or filed before a judicial body, civil litigation would not adversely impact on the judicial process itself. The inquiry in such litigation would focus on the prosecutor's

decision to initiate proceedings rather than the proceedings themselves. Moreover, unmeritorious suits could be quickly dismissed based on a lack of adequate pleading of malice or lack of probable cause in the complaint itself, the inability of a plaintiff to counter a defendant's legal arguments and factual assertions in a motion for qualified immunity, or his specific assertions of good faith and probable cause in a motion for summary judgment. Thus, the prosecutor would be protected more fully than were prosecutors, private and public, at common law, even though the common law recognized the same policy concerns that exist today – the importance of not making it unduly burdensome to bring criminal prosecutions.

This standard, like the more relaxed standard at common law, would not lead to a rash of malicious prosecution suits against prosecutors. First, all criminal defendants who were convicted – the persons most likely to feel aggrieved and to have the time to spend on litigation – would be barred from recovery. Next, the plaintiff would have to show lack of probable cause, which in most cases would involve a specific factual challenge to the quality of evidence previously accepted as sufficient (at a probable cause hearing or before the grand jury), showing in what particulars that evidence was in fact insufficient to establish probable cause. In addition, the plaintiff would have to show a malicious intent on the part of the prosecutor, an intention to bring criminal charges for an ulterior purpose rather than bringing a miscreant to justice, as well as that the prosecutor's actions violated a clearly established Constitutional right. Unless a plaintiff could overcome a prosecutor's assertion that he had reached an honest conclusion based on the evidence presented to him, the suit would be subject to summary dismissal. That these standards would not lead

to substantial litigation is evidenced by the paucity of suits against complaining witnesses, who are liable for malicious prosecution, and who may not even have the protection of qualified immunity. *Malley v. Briggs*, at 340; E. Scalia, *Police Witness Immunity under §1983*, at 1441-2, 1443-59; *Wyatt v. Cole*, 112 S. Ct. 1827 (1992).

Moreover, the malicious decision to indict will not be subject to judicial oversight in the criminal proceeding. This decision occurs out of court and will generally not be a focus of any proceeding before the criminal court, since a prosecutor's malice is not a defense to a criminal charge.

While this standard would not lead to vexatious litigation which interfered with the judicial process, it would have the effect of deterring misconduct and compensating victims of blatantly unconstitutional conduct, both legitimate goals of suits for monetary damages. *Forrester v. White*, 484 U.S. 219, 223. Although *Imbler* suggested that deterrence of prosecutorial misconduct could be achieved through disciplinary action and criminal prosecution, the empirical evidence establishes that such sanctions are unlikely to be imposed and are ineffective. See, Part I above, at 27-29. Moreover, none of the suggested alternatives provide any compensation to the victim of a prosecutor's wilfully wrongful conduct, even though his injuries, like petitioner's, can be extremely severe. Providing for a civil remedy against a prosecutor for his malicious decision to bring criminal charges without probable cause establishes the possibility of recovery for this conduct if the plaintiff can meet the high burden imposed by the common law and qualified immunity, and thereby satisfies the other equally important purpose of §1983 – compensation to the victim. *See, Owen v. City of Independence*, 445 U.S. 622 (1980).

C. Alternatively, this Court should adopt Justice White's position in *Imbler* and deny absolute immunity for respondents' decisions to prosecute and reprosecute petitioner because those decisions were accompanied by an independent allegation that respondents withheld evidence from the grand jury, the court, and petitioner.

In his concurrence in *Imbler*, Justice White, joined by Justices Marshall and Brennan, expressly excepted from the ambit of absolute immunity the knowing prosecutorial suppression of evidence, because such suppression is not subject to correction by the judicial system, and denial of immunity in such circumstances would have the "very desirable effect of deterring such conduct." *Imbler*, 424 U.S. at 442-3. (White, J., concurring) More specifically, Justice White limited his concurrence to circumstances where the malicious decision to prosecute without probable cause was not accompanied by an "independent allegation that the prosecutor withheld exculpatory information from a grand jury or the court . . . " *Id.* at 438. Petitioner's case presents the exact exception articulated by Justice White – respondents withheld crucial favorable bootprint evidence from the grand jury, from the court, and from defense counsel, who eventually discovered the information independently on the eve of trial. In light of the historical, public policy, and qualified immunity arguments set forth in parts 1 and 2 above, petitioner urges this Court to adopt Justice White's position in *Imbler*, and apply it to deny absolute immunity to respondents' malicious decision to prosecute, and reprosecute, if it chooses not to adopt the broader rationale urged in parts 2 (a) and (b) above.

CONCLUSION

In *Imbler v. Pachtman*, this Court first defined and applied absolute prosecutorial immunity. Sixteen years later, in *Burns v. Reed*, it further refined this definition, while excepting certain investigatory conduct from its ambit. In *Burns*, the Court recognized that its post-*Imbler* adoption of a greatly strengthened and objective qualified immunity standard further limited the need for absolute immunity. A thorough review of the common law and public policy further establishes that absolute prosecutorial immunity should not be extended to respondents' investigative and administrative acts and decisions. The "injury" test fashioned from whole cloth by the majority below does violence to the principles of immunity set forth above, is, as a practical matter, unworkable, and operates here to radically extend absolute immunity. Furthermore, in light of the above mentioned policy, common law, and qualified immunity considerations, a malicious decision to prosecute, particularly where there is an independent allegation of suppression of evidence, should also be excepted from the cloak of absolute immunity.

Therefore, for all the above stated reasons, petitioner urges this Court to reverse the court below, and hold that the following acts and decisions of respondents are investigative or administrative in nature and are therefore not entitled to absolute prosecutorial immunity:

1. supervising and participating in a year long pre-arrest and pre-indictment investigation which included the manufacture of evidence and the coercion of witnesses, and which led to petitioner's false arrest and imprisonment;

2. directing the arrest and imprisonment of petitioner;

3. holding a defamatory and prejudicial press conference, and conducting a prejudicial and defamatory publicity campaign;

4. deciding to continue petitioner's arrest and imprisonment after the jury hung and additional proof of innocence was produced;

5. the actual continuing of the arrest and imprisonment; and

6. the manufacturing of additional evidence after the first trial ended, in furtherance of petitioner's continued arrest and imprisonment.

Additionally, petitioner urges this Court to further hold that respondents' malicious decisions to prosecute and reprosecute him are also not entitled to the protection of absolute immunity.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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v.

J. MICHAEL FITZSIMMONS, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PROSECUTORIAL IMMUNITY APPLIES TO ALLEGATIONS OF PRE-INDICTMENT INTERROGATIONS AND MANIPULATION OF EVIDENCE WHICH CAUSE INJURY ONLY THROUGH THE PRESENTATION OF GRAND JURY AND TRIAL TESTIMONY.

II. WHETHER ABSOLUTE IMMUNITY APPLIES TO A PROSECUTOR'S ANNOUNCEMENT OF A CRIMINAL INDICTMENT WHICH ALLEGEDLY INTERFERES WITH A CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE[1]

The Murder and Initial Investigation

On February 25, 1983, eleven year old Jeanine Nicarico was abducted from her home in Naperville, Illinois and then sexually abused and murdered (J.A. 6, para. 19). Her body was found a few days later along a prairie path in DuPage County, Illinois (J.A. 6, para. 19).

An intensive investigation into the murder was initiated under the direction of DuPage County Sheriff Richard Doria and DuPage County State's Attorney J. Michael Fitzsimmons (J.A. 6-7, para. 20). During the early stages of the investigation, a boot print was discovered on the door of the Nicarico home, and Sheriff's detectives concluded that it was left by the killer (J.A. 7, para. 22). At approximately the same time, an individual named Alex Hernandez told Sheriff's Detectives that Petitioner was present during a conversation in which the murder was discussed (J.A. 7, para. 22).

Armed with that information, Sheriff's Detectives went to Petitioner's home and questioned him without a lawyer (J.A. 7, para. 23). Petitioner denied any knowledge of the crime and voluntarily turned over his boots for comparison with the boot print (J.A. 7, para. 23).

At about the same time, Defendants were supplied with a description and an F.B.I. sketch of an individual reportedly seen near the Nicarico home on the afternoon of the

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[1] The Statement of the Case is drawn solely from Petitioner's First Amended Complaint, and is accepted as true only for purposes of Respondents' claim to absolute immunity. Nonetheless, Respondents respectfully request that any opinion rendered by this Honorable Court reflect their denial of the allegations of wrongdoing, despite its irrelevance to the Court's task.

abduction (J.A. 7, para. 23). The description and sketch were dissimilar to Petitioner (J.A. 7, para. 23).

Development of Boot Print Evidence

John Gorajczyk, a deputy sheriff in charge of the identification section of the DuPage County Crime Lab, compared the soles of Petitioner's boots with the boot print and concluded that they did not match (J.A. 7, para. 24). Gorajczyk confirmed this conclusion with the head of the crime lab and his finding also was conveyed to Sheriff Doria, and Respondents Fitzsimmons, Knight and King (J.A. 8, para. 25).

Sheriff Doria then caused Petitioner's boots to be removed from Gorajczyk and sent to Defendant Edward German of the Illinois Department of Law Enforcement Crime Lab (J.A. 8, para. 26). German initially noted that Petitioner's boot "could have at best" made the boot print and that "another shoe could very well have made the prints" (J.A. 8, para. 27). German's official report stated that Petitioner's boot "could have" made the prints (J.A. 8, para. 27). German's initial notes and his official report were divulged to Sheriff Doria, Respondent Fitzsimmons and their subordinates (J.A. 8, para. 27).

Unsatisfied with German's conclusions, Respondents Knight and Fitzsimmons, and various other Defendants contacted Dr. Louise Robbins, an anthropologist, and Robert Olsen of the Kansas Bureau of Identification Crime Lab in search of a positive identification (J.A. 8, para. 28). After reviewing German's notes and report, but without actually viewing Petitioner's boot, Olsen concluded that Petitioner's boot and the boot print shared "similar class characteristics, but the paucity of sufficient similar individual characteristics precluded a positive identification" (J.A. 8-9, para. 29). These findings were made known to Respondents Knight, Fitzsimmons and King (J.A. 9, para. 30).

Respondent Knight and certain Sheriff's Department detectives then allegedly "procured a positive identification" from Dr. Louise Robbins, even though they knew or should have known that her theories and reputation were "generally discredited and viewed with great skepticism" in the forensic community (J.A. 9, para. 31).

Interrogations of Suspects and Witnesses

During the early stages of the investigation, Respondents Knight and King participated in the interrogation of witnesses and potential suspects without counsel, including Petitioner and Alex Hernandez (J.A. 9, para. 32). Despite Respondents' alleged use of intense pressure and intimidation, Petitioner maintained his innocence and demonstrated no knowledge of the crime (J.A. 9, para. 32). Petitioner further alleges that Hernandez' stories were so wildly and palpably false that his mental instability was obvious (J.A. 9-10, para. 32). At least one experienced Sheriff's detective who participated in these interrogations told Respondents Knight and King, and several Sheriff's detectives, that neither Petitioner nor Hernandez were involved in the Nicarico crimes (J.A. 10, paras. 33, 34).

Grand Jury Proceedings

Unable to solve the case, Respondents Fitzsimmons, Knight and King, and Sheriff Doria convened a special DuPage County "investigative" grand jury, devoted solely to the Nicarico case (J.A. 10, para. 35). Respondents, and certain Sheriff's Department detectives, allegedly used the grand jury as an investigative tool, by intimidating and badgering potential suspects, including Petitioner, without counsel (J.A. 10, para. 36). Despite the "strong-armed interrogation techniques," Petitioner continued to maintain his innocence before the grand jury (J.A. 10, para. 36).

Respondents allegedly presented the grand jury with only "favorable portions" of the boot print evidence, intentionally withheld Gorajczyk's findings, and misrepresented Olsen's and German's conclusions (J.A. 10-11, para. 37). Petitioner claims that Respondents "presented a large amount of obviously incredible, irrelevant, false and contradictory hearsay and double hearsay evidence designed to improperly prejudice the [Petitioner] and other suspects before the grand jury" (J.A. 11, para. 38).

Petitioner alleges that several Sheriff's Department Defendants, and Respondents Knight and King, offered reward money to induce Alex Hernandez to give false and inculpatory testimony (J.A. 11, para. 39). This testimony was placed before the grand jury even though it was false and completely unreliable (J.A. 11, para. 39).

Respondent Knight allegedly participated in the interrogation of a third suspect, Rolando Cruz, without counsel, and offered him financial payments and a rent-free apartment in exchange for inculpatory grand jury testimony which lacked credibility (J.A. 11, para. 40).

On January 27, 1984, more than eight months after the grand jury had convened and over one hundred witnesses had testified, Respondent Fitzsimmons publicly admitted that he lacked sufficient evidence to indict (J.A. 11, para. 41). This announcement came four months after the presentation of the boot print evidence to the grand jury (J.A. 11, para. 41).

The Indictment and Attendant Political Climate

The expansive publicity and intense emotions engendered by the crimes exerted great public pressure upon the Respondents to find someone to charge and prosecute (J.A. 7, para. 21). This political pressure allegedly resulted in Petitioner's grand jury indictment on March 9, 1984, just

twelve days prior to the Republican primary for State's Attorney, even though no new evidence of importance was presented to the grand jury after Fitzsimmons' announcement of January 27, 1984 (J.A. 12, para. 42).

Petitioner alleges that Respondents Fitzsimmons, Knight and King, and Sheriff Doria, were responsible for securing grand jury indictments for murder, rape and burglary against Petitioner, Hernandez and Cruz (J.A. 12, para. 42). Those indictments were allegedly obtained without probable cause so as to (1) diffuse public pressure; (2) cover up the inability to solve the crime; (3) help Respondent Fitzsimmons in his political campaign; and, (4) coerce Petitioner, Hernandez and Cruz to reveal information about the crime and/or falsely inculpate themselves or each other (J.A. 12, para. 43).

Publicity Surrounding the Indictment

Respondent Fitzsimmons publicly announced the indictments, and allegedly asserted falsely that numerous pieces of evidence, including the boot print evidence, indicated that Petitioner, Hernandez and Cruz were part of a burglary ring which committed the Nicarico crimes (J.A. 12, para. 44). Fitzsimmons also released mug shots of Petitioner, Hernandez and Cruz to the media which were prominently and repeatedly displayed on television and in the newspapers (J.A. 12, para. 44). According to Petitioner, Respondent Fitzsimmons' false and prejudicial statements inflamed the populace of DuPage County against him and his co-indictees (J.A. 12, para. 45).

Post-Indictment/Pre-Trial Occurrences

After his indictment, Petitioner was arrested and imprisoned on a three million dollar ($3,000,000) bond, allegedly at the direction of Sheriff Doria, Respondent Knight

and a Sheriff's Detective (J.A. 12-13, para 46). Respondents Knight and King, and various Sheriff's detectives again interrogated Petitioner, Hernandez and Cruz, offering them immunity from the death penalty in return for false admissions or false statements against each other (J.A. 12-13, para. 46). Despite these efforts, Petitioner continued to declare his innocence, while Hernandez retracted his prior admissions, claiming they had only been uttered in an attempt to secure the reward money (J.A. 13, para. 47). Petitioner claims the post-indictment interrogations re-enforced the innocence of Petitioner, Hernandez and Cruz (J.A. 13, para. 48).

Respondents continued to ignore a Sheriff's detective's contention that the wrong individuals were in custody (J.A. 13, paras. 48-49). This same detective was allegedly removed from the Nicarico investigation and given unfavorable assignments as a result of his pursuit of a lead concerning another suspect (J.A. 13, par 49). The head of the DuPage County Crime Lab was allegedly forced to resign for similar reasons (J.A. 13, para. 49).

Respondents Knight and King allegedly helped secrete Gorajczyk's opinion on the boot print from Petitioner's defense lawyers, who discovered Gorajczyk's opinion only through independent investigation on the eve of trial (J.A. 13, para. 50).

Political Change and Petitioner's Criminal Trial

In March, 1984, James Ryan defeated Respondent Fitzsimmons in the Republican primary (J.A. 14, para. 51). Ryan was elected in the November, 1984 general election (J.A. 14, para. 51). After taking office in December, 1984, State's Attorney Ryan appointed Respondent Knight as the Nicarico case special prosecutor and authorized Petitioner's continued imprisonment and prosecution (J.A. 14, para. 52).

Petitioner's trial began in January, 1985, under the direction of Ryan and First Assistant State's Attorney Robert Kilander (J.A. 14, para. 54). Respondents Knight and King selected a jury and jointly tried Petitioner, Hernandez and Cruz in a highly prejudicial and inflamed atmosphere, occasioned, at least in part, by the Respondents' public statements (J.A. 14, para. 54).

During trial, the prosecutors presented the boot print evidence as the cornerstone of the State's case through the testimony of Dr. Robbins, Edward German and Robert Olsen (J.A. 14, para. 55). The experts allegedly testified falsely and, in the case of Olsen and German, inconsistently with their original reports and notes (J.A. 14, para. 55).

The prosecutors also introduced the false, inculpatory statements of Hernandez and Cruz, which had been secured through coercive interrogations, promises or rewards, and other financial inducements (J.A. 15, para. 56).

The jury was hung as to the Petitioner's guilt or innocence and the court declared a mistrial (J.A. 15, para. 57). Hernandez and Cruz were convicted of the rape and murder of Jeanine Nicarico (J.A. 15, para. 57).

Decision to Re-Try and Attendant Publicity

Respondents participated in the decision to re-try Petitioner (J.A. 15, para. 58). Respondent Knight publicly announced this widely reported decision immediately after the verdicts were returned (J.A. 15, para. 58).

In addition, Respondent Fitzsimmons made post-trial public statements falsely claiming that Petitioner was guilty (J.A. 15, para. 59). Furthermore, various Respondents and Sheriff's Department Defendants, including Knight and Doria, allegedly continued to make prejudicial public statements and manipulate press coverage which prompted the Nicarico family and their friends to make inflammatory

public statements claiming that Petitioner was guilty (J.A. 15, para. 59).

Brian Dugan's Confession and the F.B.I. Report on the Boot Print Evidence

In June, 1985, Brian Dugan of Aurora, Illinois, was charged with several sexual assaults in Kane County, Illinois, including the murder and rape of seven year old Melissa Ackerman (J.A. 15, para. 60). Respondents were notified that Dugan should be investigated because of the similarities between the Ackerman and Nicarico murders (J.A. 15-16, para. 60).

Dugan told his public defender that he was responsible not only for the Melissa Ackerman crimes, but also that he murdered and raped Jeanine Nicarico and a woman named Donna Schnnor (J.A. 16, para. 61). The public defender took a statement from Dugan concerning the Nicarico murder (J.A. 16, para. 61). Dugan claimed he acted alone and related details which had not been publicly revealed and allegedly could only have been known to the murderer (J.A. 16, para. 62).

In November, 1985, Dugan's confession was conveyed to Knight, Kilander, Ryan and certain Sheriff's Detectives (J.A. 16, para. 62). Dugan's attorney proposed that his client would plead guilty to all three murders and rapes in exchange for life sentences (J.A. 16, para. 63). Though the pleas were accepted by prosecutors from Kane County and LaSalle County, Illinois, Respondents refused to accept the plea (J.A. 16, para. 63).

Respondents refused to dismiss the charges even after Dugan passed a polygraph test in December, 1985, in which he again claimed sole responsibility for the Nicarico murder, and also after he gave a detailed videotaped confession under hypnosis (J.A. 16, para. 64). Respondent

Knight made false and misleading public statements discrediting Dugan's confession and prejudicing Petitioner (J.A. 16-17, para. 65).

Respondents persisted in their refusal to dismiss the charges against Petitioner despite the conclusion of a "highly respected" F.B.I. foot print expert in June, 1986, that Buckley's boot did not match the boot print (J.A. 17, para. 66).

Dismissal of the Criminal Charges

In September, 1986, Robert Kilander procured a continuance in Petitioner's retrial because a prisoner in the DuPage County Jail had purportedly advised him (Kilander) that Petitioner had made a highly inculpatory statement (J.A. 17, paras. 67-68). The statement appeared in the media even though Petitioner's criminal defense lawyers allegedly established a short time later that Petitioner never made the statement (J.A. 17, para. 68). Furthermore, the prisoner allegedly denied telling Kilander that Petitioner had ever made the inculpatory statement (J.A. 17, para. 68).

In January, 1987, Respondents sought another continuance because Dr. Robbins was seriously ill and unable to travel from North Carolina to DuPage County for the trial (J.A. 17, para. 69). Fearing that Dr. Robbins was terminally ill, Petitioner's defense lawyers requested a videotaped examination for use at trial, but the prosecution opposed this request and it was denied (J.A. 17-18, para. 70). Dr. Robbins died in March, 1987, after which Respondents dismissed the charges against Petitioner (J.A. 18, para. 71).

Petitioner claims that Respondents, and several Sheriff's Department members used Dr. Robbins' death as a pretext to publicly explain the dismissal, rather than admit that Petitioner was innocent (J.A. 18, para. 72). This pre-

textual justification was widely reported by the media (J.A. 18, para. 73).

Current Status of the Nicarico Prosecution

Alex Hernandez and Rolando Cruz appealed their convictions and death penalties to the Illinois Supreme Court which reversed, concluding that Hernandez and Cruz should have been tried separately. *People v. Cruz*, 121 Ill.2d 321, 521 N.E.2d 18, *cert. denied*, 488 U.S. 869 (1988); *People v. Hernandez*, 121 Ill.2d 293, 521 N.E.2d 25, *cert. denied*, 488 U.S. 869 (1988). Both Hernandez and Cruz were retried, and again convicted. The Illinois Supreme Court recently affirmed Cruz' conviction and the imposition of the death penalty. *People v. Cruz*, 1992 WL 356036 (Ill.Sup.Ct. Dec. 4, 1992).[2] Hernandez' appeal from his second conviction and imposition of an eighty year sentence is pending in the Illinois Appellate Court.

SUMMARY OF THE ARGUMENT

The scope of absolute prosecutorial immunity should be carefully crafted to protect the independence and integrity of the judicial process without unnecessarily restricting a victim's right of redress. This goal can be achieved through a functional approach under which immunity applies to those acts which cause injury through the judicial process, but not to those investigative or administrative acts which injure citizens without regard to the judicial process and its attendant procedural safe-

[2] Petitioner's reference to a newspaper story and a magazine article indicating that certain law enforcement personnel believe the wrong men were prosecuted (Petitioner's Brief, pp. 10-11) constitutes an inappropriate effort to inject extraneous and irrelevant opinions into the record.

guards. *Compare Imbler v. Pachtman*, 424 U.S. 409 (1976) (immunity from malicious prosecution) *with Burns v. Reed*, 111 S.Ct. 1934 (1991) (only qualified immunity from false arrest).

To assess those forms of prosecutorial conduct which are within the umbrella of absolute immunity, the Court need not blindly adhere to the phraseology chosen by the Petitioner to describe a particular act. In order to prevent *Imbler* from being whittled to a mere pleading rule, the Court should focus on the underlying nature of Petitioner's cause of action in order to fairly categorize the true prosecutorial acts at issue. For from a novel approach to resolving immunity issues, the court of appeals' focus on the nature of Petitioner's cause of action to help delineate the targeted act is well-grounded in this Court's various decisions interpreting the scope of official immunities.

Applying such an approach in the instant case exposes Petitioner's claims, assertedly premised on out-of-court interrogations and manipulation of boot print evidence, to be a disguised attack on the prosecutors' alleged eliciting of tainted testimony before the grand and petit juries. Indeed, with respect to the interrogations, Petitioner has expressly conceded that he was injured only through the introduction of the fruits of the interrogations at trial and to the grand jury. The eliciting of testimony lies at the very heart of the prosecutors' quasi-judicial function for which immunity was conferred in *Imbler*.

The mere titling of a claim as one for false arrest does not alter the scope of the prosecutors' immunity for the conducting of grand jury proceedings. While neither prosecutors, police officers nor other public officials have traditionally been accorded absolute immunity from false arrest, the common law, historical tradition and public policy all lend compelling support for application of absolute immunity to a prosecutor's conduct of grand

jury proceedings. For that reason, Petitioner's claim for false arrest fails to circumvent absolute immunity to the extent it simply represents another way of suing the prosecutors for their efforts to seek and obtain an indictment. To the extent Petitioner sues the individual prosecutors for false arrest on account of injuries suffered aside from the grand jury's return of an indictment, Respondents have no quarrel with the court of appeals' denial of absolute immunity.

Petitioner's claim for deprivation of a fair trial stemming from Respondent J. Michael Fitzsimmons' inflammatory announcement of his indictment is treated separately. This is because, unlike the claims based upon the interrogations and alleged manipulation of evidence, Petitioner's unfair trial claim against Fitzsimmons does not involve prosecutorial conduct which truly occurred within the confines of the courtroom. To the contrary, that particular claim targets a prosecutor's out-of-court act which was intended to tilt the trial process in the State's favor.

This Court has recognized that immunity must, in certain circumstances, extend to a prosecutor's acts beyond the courtroom when both the common law and the policies underlying principles of absolute immunity so require. These principles support the application of absolute immunity to a prosecutor who is sued for deprivation of a fair trial. The common law often applied absolute immunity to prevent the relitigation of judicial determinations in a civil damages suit against judicial officers. Although the common law never specifically addressed the scope of immunity for a prosecutor's press statements, the impact of mass media on the fairness of criminal proceedings was never contemplated by the common law. Inasmuch as the scope of present day immunities need not precisely mirror common law immunities,

the long-standing tradition of immunizing judicial officers from malicious prosecution and unfair trial claims provides more than adequate support for the immunity sought by Respondent Fitzsimmons.

Moreover, the policy considerations upon which absolute immunity is premised provide compelling support to the extension of immunity to a prosecutor's announcement of an indictment which is alleged to have infringed on a criminal defendant's right to a fair trial. The public announcement of an indictment raises a significant threat of retaliatory litigation in the form of an unfair trial claim, particularly if that announcement constitutes the sole hook upon which a criminal defendant may achieve the relitigation of his criminal trial in a civil forum. Nonetheless, such announcements are required of a prosecutor in order to ensure that the public is informed of the important activities of the prosecutor's office. The harm suffered by victims of prejudicial pretrial publicity who are denied an avenue of civil redress against the culpable prosecutor is substantially minimized because of the wide array of procedural safeguards available to ward off external media influence over the trial process.

To ensure that the specter of entanglement in civil litigation does not deter prosecutors from vigorously pursuing indictments and prosecutions against suspected law violators, absolute immunity should be vigilantly applied when the prosecutor functions in an arena which is integral to the judicial process. In the present context, the Respondent prosecutors' pursuit of a grand jury indictment and criminal prosecution against Petitioner is precisely the type of conduct which was contemplated by this Honorable Court in extending immunity to prosecutors.

ARGUMENT

I. PROSECUTORIAL IMMUNITY APPLIES TO ALLEGATIONS OF PRE-INDICTMENT INTERROGATIONS AND MANIPULATION OF EVIDENCE WHICH CAUSE INJURY ONLY THROUGH THE PRESENTATION OF GRAND JURY AND TRIAL TESTIMONY

A. General Principles

> One of the greatest difficulties of the position is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives a complaint . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest and the proof the most certain.

Jackson, *The Federal Prosecutors*, 24 J.Am. Judicature Soc'y 18 (1940).

To ensure that prosecutors "who wield this power will be guided solely by their sense of public responsibility," rather than the fear of civil liability, they are absolutely immune from civil rights suits for malicious prosecution,[3] and for acts "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). Prosecutorial immunity is derived from the common law grant of immunity to judicial officers for acts within the scope of their official capacities. *See, e.g., Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 347, 351 (1871) (judges). This broad grant of immunity was extended to prosecutors because, as indicated above, they are integrally involved in the judicial process, and they are particularly susceptible to retaliatory lawsuits. The inhibition posed by the specter of entanglement in civil litigation could lead prosecutors to refrain from trying close cases or to withhold relevant evidence in cases of arguable admissibility for fear of the consequences of not prevailing. *Imbler*, 424 U.S. at 426.

[3] It is unsettled whether the common law tort of malicious prosecution, standing alone, is actionable under 42 U.S.C. § 1983. *Compare Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992) (malicious prosecution not a constitutional claim), *petition for cert. filed*, 61 U.S.L.W. 3403 (Nov. 12, 1992) *with Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (malicious prosecution redressable under § 1983), *cert. denied*, 494 U.S. 1081 (1990). Nonetheless, Petitioner's incarceration pending dismissal of the criminal charges constitutes a sufficient deprivation of liberty to permit a constitutional challenge to the circumstances of his prosecution. *See Albright*, 975 F.2d at 346.

While absolute immunity deprives victims of prosecutorial misconduct of an avenue of civil redress, the plethora of safeguards built into the criminal justice system to prevent and counter such misconduct minimizes the consequences of insulating prosecutors from the additional accountability achieved from exposure to civil rights liability. *See Burns v. Reed*, 111 S.Ct. 1934, 1939, 1942 (1991).

Imbler confirmed a prosecutor's immunity from malicious prosecution claims. However, it was not until *Burns* that this Court considered the scope of immunity for a prosecutor's participation in investigative conduct which gives rise to fourth amendment claims more traditionally brought against police officers. In concluding that qualified immunity was adequate to protect both police officers and prosecutors under such circumstances (*Burns*, 111 S.Ct. at 1943-44), the Court did not assess the scope of immunity available to a prosecutor who participates in the investigative process, but does not engage in any activity which violates the Constitution other than through the grand jury and criminal trial process. That question is squarely presented by the instant controversy.

To determine whether absolute immunity applies, this Honorable Court has traditionally applied a two-step ap-

proach. First, the Court seeks historical or common law support for the asserted immunity, although " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Second, the Court considers whether the policy considerations articulated in *Imbler* are furthered through application of immunity. *Burns*, 111 S.Ct. at 1941.

B. Petitioner's Claims of Pre-Indictment Prosecutorial Misconduct are Limited to the Interrogations and Manipulation of the Boot Print Evidence

Petitioner alleges that the prosecutors participated in a "year long pre-arrest and pre-indictment investigation" (Petitioner's Brief, p. 18). Such descriptive labels, however, are not useful in analyzing the scope of immunity for a particular function. Only through a fair characterization of the particular act targeted can the prosecutors' entitlement to immunity be properly determined.

As both lower courts acknowledged (J.A. 39, 92-93), Petitioner's complaint challenges only two aspects of pre-indictment prosecutorial activity aside from the conducting of grand jury proceedings. First, Petitioner charges Respondents Knight and King with pressuring and intimidating Petitioner and other potential suspects during interrogations without counsel. Nonetheless, Petitioner maintained his innocence, and Alex Hernandez told such wild and obviously false stories that his mental instability was allegedly obvious. After the grand jury was empaneled, Respondents allegedly offered financial inducements to Hernandez and Rolando Cruz in exchange for false inculpatory testimony.

Second, Petitioner charges the prosecutors with (1) suppressing Deputy Gorajczyk's opinion on the boot print; (2) convincing Edward German and Robert Olsen to alter

their initial opinions and reports; and, (3) procuring a positive boot print identification from Dr. Louise Robbins, who, according to Petitioner, was widely known to have been discredited and viewed with great skepticism.

C. Focusing on the Nature of Petitioner's Claimed Injury Helps Categorize the Challenged Act and Prevents the Dilution of *Imbler* Into a Mere Pleading Rule

1. The Interrogations

The crux of the dispute concerning the application of absolute immunity to the prosecutors' conducting of interrogations centers on the proper characterization of Petitioner's claims, as opposed to any significant divergence of views concerning legal doctrine or theory. Respondents acknowledge that immunity does not insulate prosecutors from constitutional accountability for illegal out-of-court interrogations (J.A. 93-95). The interrogation of witnesses and suspects during a criminal investigation is not fairly characterized as necessary to the judicial phase of the criminal justice process. Moreover, judicial safeguards are unavailable to counter the harm caused by out-of-court interrogations. Accordingly, the justifications for absolute immunity at both the common law and under § 1983 are absent.

These concessions, however, do not undercut Respondents' entitlement to absolute immunity because the interrogations did not violate Petitioner's constitutional rights. By focusing on the nature of Petitioner's claimed injury and, therefore, his cause of action, it is apparent that Petitioner is really seeking to hold the prosecutors accountable for eliciting allegedly false testimony before the grand and petit juries, rather than for the investigatory interrogations he purportedly targets. Indeed, Petitioner has expressly conceded that the only harm he at-

tributes to the interrogations of both himself and other suspects occurred "when the fruits of the interrogation were used in the criminal process (i.e., a statement was presented to the grand jury or at trial)" (Petitioner's original Petition for a Writ of *Certiorari*, No. 90-7574, p. 10 & n. 3).

Far from "a novel and radical extension of absolute immunity" (*see* Petitioner's brief, p. 17), the lower court's focus on the nature of the claimed injury is simply the most efficient and practical method of fairly categorizing the challenged prosecutorial acts, and of preventing the dilution of *Imbler* immunity into a mere pleading rule. If prosecutorial immunity could be circumvented through the mere targeting of out-of-court interrogations which culminate in and cause injury only through the presentation of in-court testimony, it would be meaningless for all but those few prosecutors who postpone their entry into a case until it reaches the courtroom. Neither § 1983 nor this Honorable Court's limitations on immunity were intended to discourage prosecutors from fully investigating the cases they present in court. To the contrary, only illegal or unconstitutional investigative tactics need be deterred. Thus, absolute immunity will not help an overzealous prosecutor who uses excessive force to elicit a confession during an interrogation. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) (fourth amendment prohibits use of unreasonable force). Similarly, a prosecutor's interrogation of a suspect which ripens into an arrest without probable cause because of the suspect's well-grounded belief that he is not free to leave, would give rise to a compensable fourth amendment claim against the prosecutor. *See Burns*. However, where the interrogation is not conducted illegally, and only causes injury through in-court testimony shaped from the fruits of the interrogation, *Imbler* and its progeny prohibit the recovery of any damages from the prosecutor based upon his eliciting of false testimony.

2. The Manipulation of Boot Print Evidence

As with the interrogations, Petitioner does not seriously dispute the fact that the injury he suffered as a result of the manipulation of the boot print evidence occurred when the experts' opinions were put before the grand and petit juries (Petitioner's Brief, pp. 24-25). Accordingly, the source of injury approach again reveals that Petitioner's true claim is premised upon the prosecutors' eliciting of false testimony before judicial bodies, rather than any meetings they attended with the experts. Such conduct falls well within the umbrella of absolute immunity. *Imbler*, 424 U.S. at 425-27.

Even without resort to the source of injury approach, however, Petitioner's claim concerning the prosecutors' handling of the boot print evidence fails to allege conduct which escapes application of absolute immunity. While Petitioner alleges the prosecutors ignored one expert, manipulated two others, and "procured" a positive identification from a third, such allegations involve conduct which was critical to the decision to indict. Meetings with a variety of experts to fully evaluate the strength of an important piece of evidence are essential to an informed decision. The evaluation of evidence has been recognized by this Court to be essential to trial preparation and to the initiation of the criminal process. *Imbler*, 424 U.S. at 431 n. 33. *See also Ware v. Carey*, 75 Ill. App.3d 906, 394 N.E.2d 690, 694 (1979) (state's attorney is responsible for evaluating evidence to determine if an offense should be charged).

Moreover, the prosecutors' evaluation and development of the boot print evidence cannot be equated, as Petitioner attempts, to the "manufacturing" of evidence in the sense that a prosecutor might "plant" narcotics or a firearm on a suspect's person. The prosecutors' involvement with

the boot print evidence did not begin until after (1) Sheriff's detectives had concluded that the killer left a telling boot print on the door of the Nicarico residence; (2) Alex Hernandez had voluntarily come forward with statements implicating Petitioner in the murder; (3) Sheriff's police had obtained Petitioner's boots for comparison purposes; (4) a Sheriff's Department employee had conducted a preliminary comparison of the boot print with Petitioner's boot; and, (5) Sheriff Doria had forwarded the boot print to expert Edward German for analysis (J.A. 7-8).

After being advised of the foregoing information, the prosecutors were duty-bound to evaluate and develop the boot print evidence to assess whether it would support an indictment. Anything less would have constituted professional malfeasance. Accordingly, the prosecutors' evaluation and development of the boot print evidence cannot fairly be characterized as the manufacturing of evidence. As the court of appeals acknowledged, "it is word play to call prosecutors' endeavors in asking experts for assistance 'investigative' in the way hypnotizing or arresting suspects is" (J.A. 104) (distinguishing *Burns*).

D. The Source of Injury Approach is Consistent with and Supported by *Imbler*, *Burns* and other Applicable Precedent

Imbler was clearly intended to have more bite than it would under Petitioner's view, which restricts immunity to trial conduct only (*See* Petitioner's Brief, p. 18). That this is true is perhaps best illustrated by considering the full array of prosecutorial conduct for which absolute immunity was conferred in *Imbler*, and comparing it with the conduct at issue in both *Burns* and in the instant case.

After Imbler was charged, prosecutor Pachtman allegedly conspired with police to alter a police sketch of the murder suspect so that it would resemble Imbler. *Imbler*,

424 U.S. at 416. *See also* Complaint in *Imbler v. Pachtman*, No. 71-123-IH, p. 12 (hereinafter "*Imbler* complaint").[4] Clearly, the out-of-court preparation and alteration of a police sketch is at least as investigatory in nature as are interrogations and advising police concerning an arrest (*See Burns*), and it is more properly characterized as investigatory than is the manipulation of expert witnesses. Nonetheless, such conduct failed to deprive prosecutor Pachtman of immunity presumably because the only injury Imbler attributed to the altered sketch occurred when it was "used to aid in convicting" him and to deprive him of his "rights to a fair trial." *See Imbler*, 424 U.S. at 416; *Imbler* Complaint, p. 12.

Prosecutor Pachtman also allegedly suppressed a finger print expert's exculpatory opinion. *Imbler*, 424 U.S. at 415. Such a claim by nature implies that the prosecutor acquired knowledge out-of-court and culpably decided to refrain from introducing the information into the criminal justice process. Nonetheless, this Honorable Court deemed immunity under such circumstances essential to prevent claims against prosecutors for eliciting false testimony from simply being recast as suppression claims. *Id.* at 431-32 n. 34. Again, Imbler's suppression claim is similar to Petitioner's claim concerning Respondents' alleged suppression of Deputy Gorajczyk's opinion.[5]

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[4] The *Imbler* complaint is lodged with the Clerk of this Honorable Court.

[5] Actually, the suppression allegations against Prosecutor Pachtman were more serious than Petitioner's claim regarding Gorajczyk's opinion. While Imbler did not discover the suppression until well after his conviction, Petitioner's counsel learned of Gorajczyk's opinion on the eve of trial (J.A. 13). Thus, Petitioner suffered no constitutional violation. *See United States v. Williams*, 112 S.Ct. 1735 (1992) (no duty to disclose exculpatory evidence to grand jury).

Finally, Prosecutor Pachtman also asked police officers to delay the arrest of a prosecution eyewitness on unrelated charges until after he had completed his testimony, so that the witness' arrest could not be utilized to discredit his identification of Imbler as the murderer. *Imbler*, 424 U.S. at 430 n. 32. Viewed in a vacuum, such conduct is virtually indistinguishable from Prosecutor Reed's advice to police concerning an arrest in *Burns*.

When viewed in context, however, the difference between *Imbler* and *Burns* is grounded in the nature of the Petitioner's cause of action: in *Burns*, false arrest; in *Imbler*, deprivation of a fair trial. Indeed, in *Imbler*, this Honorable Court aptly recast the plaintiff's claim of investigatory misconduct "in its proper light" as "an effort to control the presentation of [the] witnesses' testimony, a task fairly within [the prosecutor's] function as an advocate." *Imbler*, 424 U.S. at 430 n. 32. Thus, in *Imbler*, as in the instant case, the Petitioner's true claim was premised upon the eliciting of tainted testimony. In *Burns*, by contrast, the prosecutor's advice caused an out-of-court injury.

Aside from *Imbler*, the Seventh Circuit's recasting of Petitioner's claim "in its proper light" as a means of fairly categorizing the prosecutors' acts is not unprecedented. In *Lee v. Willins*, 617 F.2d 320 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1981), the court held that prosecutorial immunity applies even to investigative conduct where the plaintiff seeks to "recover for an injury arising solely from the prosecution—e.g., being compelled to stand trial or to suffer imprisonment or pretrial detention."[6] *Id.* at 322.

[6] The prosecutor in *Lee* was accused of wide-ranging pre-indictment investigatory conduct, including coercing perjured testimony by arresting and incarcerating two witnesses, threatening to take away a witness' baby, inducing another witness to refrain from testifying by dropping felony charges against her and supervising police officers who planted a pistol in Lee's possession. 617 F.2d at 321.

Only where out-of-court acts cause "harm [to be] inflicted independently of the prosecution" is immunity inapplicable. *Id.*

This Honorable Court also implicitly approved the same approach in its first look at prosecutorial immunity in *Yaselli v. Goff*, 275 U.S. 503 (1927) (*per curiam*), *aff'g* 12 F.2d 396 (2nd Cir. 1926). *Yaselli* involved a plaintiff who sought to avoid immunity by alleging that the defendant conspired to secure an appointment as a special assistant prosecutor in order to have a receiver appointed over plaintiff's company to facilitate the illegal inspection and seizure of plaintiff's personal papers so as to support an indictment.[7] However, the plaintiff did not sue under the fourth amendment for illegal search and seizure; he sued only for malicious prosecution.

The prosecutor's conduct in *Yaselli* was far more attenuated from the judicial process than that of Respondents here,[8] yet it was similar insofar as the alleged injury was caused solely through the prosecution. Accordingly, this Court discounted the Petitioner's allegations concerning out-of-court conduct and affirmed the Second Circuit's grant of prosecutorial immunity. *Yaselli*, 275 U.S. 503. *Accord Weaver v. Devendorf*, 3 Denio 117, 120 (1846) ("no public officer is responsible in a civil suit, for a judicial determination").

The rule to be gleaned from these cases and from the lower court's opinions in the present matter, is that the targeting of extra-judicial acts will not circumvent absolute

[7] In furtherance of the conspiracy to obtain the appointment, the defendant also allegedly caused manufactured evidence of criminal misconduct concerning the plaintiff to be misrepresented to the government. *Yaselli*, 12 F.2d at 398.

[8] Indeed, the defendant in *Yaselli* was not even a prosecutor when he conspired to secure the appointment.

immunity where an analysis of the plaintiff's complaint reveals a disguised claim for injuries caused by a prosecutor's charging decision or for his actions in front of judicial bodies.

Petitioner insists that his "challenge to the false evidence related primarily to the manufacture of the evidence, not its use against him in the criminal trial" (Petitioner's Brief, p. 24). For that reason, he argues that "litigation of this claim would not question or impinge upon the prosecutors' decision to prosecute Petitioner or introduce the evidence before the grand jury or at trial, but rather, (sic) Respondents' role at an earlier period of time when they were acting as, and with, police investigators" (Petitioner's Brief, p. 24).

But how can this be? The manufacturing of evidence is not redressable if it does not intrude upon a constitutionally guaranteed right of liberty or privacy. And, as the court of appeals pointed out, "[o]btaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from what happens in court" (J.A. 92-93). It is disingenuous, therefore, for Petitioner to suggest that litigation of the boot print evidence claim can be divorced from the prosecutors' "decision to prosecute or introduce the evidence before the grand jury or at trial," because it is only through the decision to prosecute and to present the evidence to judicial bodies that the conduct became constitutionally significant.

Petitioner also argues that the distinction between immunized and non-immunized conduct cannot rest on the "fortuity of prosecution," because prosecutors could then "launder" all investigative conduct through the judicial process to avoid civil liability (Petitioner's Brief, p. 26). This concern, however, is specious. The court of appeals emphasized that immunity is unavailable for a prosecutor's

interrogations or other investigative acts which deprive citizens of constitutional rights independent of the judicial process (J.A. 93-95). That being the case, a decision to prosecute will not benefit a prosecutor who has committed constitutional wrongs prior to the initiation of the judicial process. Accordingly, the continued availability of a remedy against prosecutors for unconstitutional investigative conduct which produces injury out-of-court eliminates any incentive for prosecutors to file charges as a means of avoiding liability.

E. Petitioner's False Arrest Claim is a Thinly Disguised Challenge to the Prosecutors' Obtaining of an Indictment

Respondents acknowledge that a prosecutor's forays into certain aspects of the criminal justice process are safer than others from a civil liability perspective. This is evident when *Imbler* is contrasted with *Burns*: the former having conferred absolute immunity from claims evolving from a prosecution, the latter withholding immunity for investigative conduct causing an arrest. Because Petitioner's case involves both false arrest and malicious prosecution claims, it is a rough amalgam of *Burns* and *Imbler*. Acknowledging Petitioner's false arrest claim for the first time in its second opinion, the Seventh Circuit remanded that claim to the district court for resolution of any constitutional claims against only those prosecutors who actually arrested Petitioner (J.A. 109).

The breadth of the Seventh Circuit's remand on the false arrest claim was properly limited in scope to those prosecutors who actually arrested Petitioner, rather than to those who may have caused his indictment, and thus, his arrest, through the grand jury process. As both this Court and the Seventh Circuit have acknowledged, absolute immunity for the decision to seek an indictment and

for the conducting of grand jury proceedings is well established. *See Burns v. Reed*, 111 S.Ct. at 1934 n. 6; (J.A. 92). If immunity from liability for such activities could be circumvented by simply titling the claim "false arrest," *Imbler* would again be reduced to a mere pleading rule. This is especially true in this case, because under Illinois law, the filing of a grand jury indictment requires the judiciary to "immediately issue a warrant for the arrest" of the charged person. *See* Ill.Rev.Stat. ch. 38, para. 111-2(d).

The fact that Petitioner was indicted by a duly convened grand jury, whereas Cathy Burns was arrested pursuant to the advice of a prosecutor and observations of police officers, supports the distinction between the scope of immunity applicable in the two cases. *Accord Malley v. Briggs*, 475 U.S. 335 (1985) (refusing to equate prosecutor's obtaining of indictment with police officer's securing of arrest warrant). Respondents, therefore, have no quarrel with *Burns'* placement of police officers and prosecutors on the same footing for immunity purposes when they act together to cause fourth amendment violations which occur outside the judicial process. Such conduct cannot fairly be characterized as essential to either the judicial process or to the decision to prosecute, nor can it be controlled or countered through the safeguards inherent in the criminal justice system. Moreover, neither the common law nor historical tradition support the application of absolute immunity to either prosecutors or other public officers charged with false arrest.

Such is not the case, however, where the Petitioner's injury, whether it be false arrest or some other constitutional deprivation, occurs because of a grand jury indictment. Immunity for a prosecutor's conduct before a grand jury, as well as for his actions in securing an indictment, are firmly entrenched in historical tradition and supported by the common law. *See, e.g., Griffith v. Slinkard*, 146 Ind.

117, 44 N.E. 1001 (1896) (prosecutor altered a grand jury true bill); *Turpen v. Booth*, 56 Cal. 65, 38 Am.Rep. 48 (1888) (grand juror's immunity); *Hunter v. Mathis*, 40 Ind. 356 (1872) (same). "The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury" (J.A. 92), *citing Gray v. Bell*, 712 F.2d 490, 502-05 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

Petitioner's laundering theory warns that evil prosecutors will be encouraged to pursue grand jury indictments as opposed to simply causing an arrest in concert with the police (Petitioner's Brief, pp. 35-36). Respondents suggest that this is a course of action to be encouraged. In addition to its obligation "to inquire into the existence of possible criminal conduct" (*Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)), the grand jury is equally duty bound to ensure that the innocent are protected from unfounded criminal prosecutions. *See Wood v. Georgia*, 370 U.S. 375, 390 (1962). Moreover, the supervisory power of the court attaches to grand jury proceedings, and transcripts of those proceedings must be made available for impeachment purposes in later criminal proceedings and, importantly, for the evaluation of claims of prosecutorial misconduct. *See* Ill.Rev.Stat. ch. 38, para 112-7. *See also People v. Goldberg*, 302 Ill.559, 135 N.E. 84 (1922); *People v. Linzy*, 78 Ill.2d 106, 398 N.E.2d 1 (1979). These procedural safeguards constitute important checks on prosecutorial conduct which are absent when the prosecutor pursues an arrest outside the judicial process. The judicial function performed by the grand jury which includes the presence of judicial safeguards against prosecutorial misconduct, thus supports the virtually unbroken line of precedent according prosecutors immunity for their conduct before grand juries.

Because the Petitioner's claim against the Respondents for allegedly engaging in pre-indictment misconduct only caused Petitioner injury through the introduction of testimony to the grand jury and at Petitioner's criminal trial, the court of appeals properly barred those claims under the doctrine of absolute immunity.

II. ABSOLUTE IMMUNITY APPLIES TO A PROSECUTOR'S ANNOUNCEMENT OF A CRIMINAL INDICTMENT WHICH ALLEGEDLY INTERFERES WITH A CRIMINAL DEFENDANT'S RIGHT TO A FAIR TRIAL

Respondent J. Michael Fitzsimmons' announcement of Petitioner's criminal indictment warrants separate treatment because, as acknowledged by the court of appeals, the public statements neither occurred in court nor did they constitute trial preparation (J.A. 105). Though the interrogations and obtaining of expert opinions also did not themselves occur in the courtroom, Petitioner's true claims in that context arose from the presentation of the fruits of those activities to the grand and petit juries. Fitzsimmons' extra-judicial statements are distinguishable in that they were never formally introduced into the trial, but are alleged only to have externally infected the process.

A. The Common Law's Immunizing of Judicial Officers from Malicious Prosecution Claims Supports Respondent Fitzsimmons' Entitlement to Immunity

To determine whether absolute immunity should apply, the Court initially "look[s] to the common law and other history for guidance," although " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). In the present context, Respondents suggest that both the common law and historical tradition support the application of absolute immunity to Petitioner's unfair trial claim against Respondent Fitzsimmons.

At common law, immunity was often "tied to specific causes of action and specific actors." Kaufman, § 1983: *Absolute Immunity For Pretrial Police Testimony*, 16 Fordham L.Rev. 647, 655 (1988). Accordingly, immunity often depended to a large extent on the manner in which a particular cause of action was characterized. *Id.* In order to protect judicial determinations from relitigation in a civil context, therefore, judicial officers traditionally were held immune from malicious prosecution claims, without any differentiation concerning the varying forms of conduct which may have combined to form the malicious prosecution. *See* Townshend, *Slander and Libel*, § 227, pp. 395-96 (3d Ed. 1877). This same approach persevered when immunity was later conferred on prosecutors from claims of malicious prosecution or deprivation of a fair trial. *See Griffith v. Slinkard, supra*; *Yaselli v. Goff, supra*, *Imbler v. Pachtman, supra.*

In light of the immunity traditionally accorded prosecutors from malicious prosecution and unfair trial claims,[9] Respondents contend that Petitioner's claim against Fitzsimmons would have been barred by immunity at common law had the issue been squarely presented.

The mere fact that the specific issue of immunity for press conferences was not considered at the common law is not controlling. Press conferences and the impact of

[9] Malicious prosecution and unfair trial claims are essentially indistinguishable for purposes of assessing the scope of immunity. While the former challenges the decision to prosecute and the latter focuses on the conduct of the trial itself, both target the very essence of the prosecutor's quasi-judicial function, and are equally likely to be the product of a disgruntled criminal defendant's ire against the judicial system.

mass media on the fairness of criminal trials were not contemplated by the common law. If Congress did not intend to abrogate existing common law immunities when enacting § 1983 (*Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)), it is equally unlikely that Congress intended future courts to ignore unanticipated and unforeseen developments when interpreting the scope of those immunities.

Moreover, because the common law lends support to an immunity from malicious prosecution or unfair trial claims, Respondents contend that it is unnecessary to locate a corresponding common law immunity for the specific prosecutorial act (in this case a press conference) which caused the unfair trial. Given the nature of the Petitioner's cause of action, it is beyond dispute that the Petitioner seeks to recover for a prosecutor's alleged efforts to bring about a criminal conviction by tilting the trial process in his favor. As argued previously (*see supra*, pp. 20-24), an act which is characterized as either investigative or administrative in a particular context, may, nonetheless, be unredressable under principles of absolute immunity when the Petitioner seeks to relitigate a criminal trial through a malicious prosecution or unfair trial claim. *Compare Imbler, supra*, (absolute immunity for prosecutor who advised police to delay arrest of trial witness) *with Burns, supra*, (only qualified immunity for prosecutor's advice to police officers concerning arrest).

B. Policy Considerations Support Absolute Immunity from Liability for the Announcement of a Criminal Indictment

The policy considerations upon which principles of absolute immunity are premised are furthered in the context of Petitioner's unfair trial claim against Respondent Fitzsimmons. The risk of entanglement in vexatious and diverting civil litigation is enormous whenever a criminal

defendant is allowed to sue a prosecutor for deprivation of a fair trial. It is fairly predictable that a disgruntled criminal defendant will often seize upon any available vehicle to permit the relitigation of his criminal case in a civil context. *See Imbler*, 424 U.S. at 424-25. Given the availability of absolute immunity for a prosecutor's in-court activities, the absence of immunity for press statements may provide the only hook available to a criminal defendant who believes he has been injured by the judicial system. The present case provides a lucid example: although Petitioner's complaint details a variety of prosecutorial conduct alleged to have deprived him of a fair trial, his petition for a writ of *certiorari* presses only the media claim against Respondent Fitzsimmons.

Immunizing the prosecutor from entanglement in unfair trial claims tied to the announcement of a criminal indictment, is palatable given the plethora of procedural safeguards designed to ward off external media infections of the criminal trial process. Specifically, jury *voir dire*, peremptory challenges, challenges for cause, motions to change venue, and ultimately, motions for dismissal, are all intended to prevent the trial process from being sabotaged by outside influences (*See* J.A. 90). Indeed, this Honorable Court has repeatedly relied upon the availability of such judicial checks on prosecutorial misconduct as a determinative factor in assessing the scope of immunity. *See Burns, supra*, 111 S.Ct. at 1942, 1944; *Imbler, supra*, 424 U.S. at 427. To the extent Petitioner contends these procedural safeguards did not work effectively in his criminal trial, his claim against Respondent Fitzsimmons is revealed as a "disguised attack on either the institution of the prosecution itself, or the decisions of the judges at the bail hearing and trial" (J.A. 90).

Checks on prosecutorial misconduct such as professional discipline also minimize the need for exposing prosecu-

tors to civil rights liability for making improper press statements. *See Malley v. Briggs*, 475 U.S. 335, 343 n. 5 (1985). While Petitioner argues that these alternative methods of deterrence have proved ineffectual since *Malley*, the fact is that the state bars are gradually becoming increasingly vigilant in policing prosecutors. *See, e.g., Zimmermann v. Board of Professional Responsibility*, 764 S.W.2d 757 (Tenn. 1989) (prosecutor reprimanded for making extra-judicial statements); *In re: Disciplinary Proceedings Against Allen R. Brey*, 171 Wis.2d 65, 490 N.W.2d 15 (1992) (prosecutor suspended from practice for 60 days for misconduct in connection with criminal prosecution); *People v. Reichman*, 819 P.2d 1035 (Colo. 1991) (public censure of prosecutor for filing false criminal complaint in effort to protect undercover officer). *See also In re: Friedman*, 76 Ill.2d 392, 392 N.E.2d 1333 (1979) (prosecutor not disciplined because action in conducting investigation appeared proper).[10]

Other important public policy concerns support the extension of absolute immunity to a prosecutor's announcement of a criminal indictment. One of the primary functions of an Illinois State's Attorney is to "commence and prosecute all actions, suits, indictments and prosecutions."

[10] Petitioner's citation to several cases in which he served as counsel is not persuasive (*See* Petitioner's Brief, p. 29 n. 8). While Petitioner's counsel charged various prosecutors with misconduct in all of the cited cases, none resulted in a finding of misconduct against any prosecutor. *See Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979) (ordering new trial); *Palmer v. City of Chicago*, 562 F.Supp. 1067, 1071 (N.D.Ill. 1983), *rev'd on other grounds*, 755 F.2d 560 (7th Cir. 1985) (police policy of secreting exculpatory evidence); *Jones v. City of Chicago*, 856 F.2d 985, 989-90 (7th Cir. 1988) (reviewing judgment against police officers and forensic witness, but not prosecutor, in malicious prosecution case); *People v. Wilson*, 116 Ill.2d 29, 506 N.E.2d 571 (1987) (no finding that prosecutor had knowledge of police brutality).

Ill.Rev.Stat. ch. 14, para. 5 (1987). Concomitant to those responsibilities is his obligation to make public statements to inform the public about the activities of the office. *See Ware v. Carey*, 75 Ill.App.3d 906, 394 N.E.2d 690, 695 (1979), *citing ABA Standards Relating to the Administration of Criminal Justice, Compilation*, p. 77 (1974). In light of that obligation, prosecutors would be in a "Catch 22" if immunized from the decision to indict, but not for the announcement of that indictment.

The chilling effect of such a precedent warrants serious consideration. If faced with liability for the announcement of an indictment, prosecutors will be predictably reluctant to inform the public of the basis for indictments, particularly in cases of substantial public interest where the demand for information is greatest. Reluctance would be greater in such cases because the media's more expansive coverage of the announcement would increase the likelihood of a civil rights claim linked to unfavorable publicity. Such reluctance would be inconsistent with the prosecutor's duty to keep the public informed of the important activities of the office and could lead to the further erosion of confidence in law enforcement in general.

Indeed, the criminal trial process is, by nature, public, as the full power of the state is exerted upon the accused. Such governmental action is not permissible in a democratic society without public scrutiny and accountability. *See In re: Matter of Grand Jury Proceedings: Krynick v. Falk*, 1992 WL 360588, ____ F.2d ____ (7th Cir. Dec. 8, 1992). Against that backdrop, insulating the announcement of criminal indictments from civil rights challenges is vital to "protecting the free flow of information from the prosecutor" to the public and to "preservation of public awareness and the proper performance of a prosecutor's duties." *Strong v. Slaton*, 510 F.Supp. 161, 163-64 (N.D.Ga. 1981).

C. Qualified Immunity Provides Inadequate Protection from Unfair Trial Claims

Petitioner has argued that the expanded scope of qualified immunity is sufficient to further the policy interests described above without unnecessarily restricting a victim's right of redress against corrupt prosecutors. However, notwithstanding the increased protections provided by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity is wholly inadequate to protect a prosecutor from the type of claim Petitioner asserts against Respondent Fitzsimmons.

A plaintiff may defeat qualified immunity by identifying a violation of a "clearly established . . . constitutional right of which a reasonable person would have known." *Id.* at 818. Applying that standard in the present context, it has been clearly established for many years that expansive media coverage implicates a criminal defendant's due process entitlement to a fair trial, particularly in high profile, controversial cases. *See, e.g., Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *People v. Taylor*, 101 Ill.2d 377, 462 N.E.2d 478, 482-88 (1984). Accordingly, claims such as Petitioner's are not the type which are fairly susceptible to pre-trial resolution under *Harlow*, but rather, lend themselves to factual disputes more readily capable of resolution at trial.

Any claim alleging deprivation of a fair trial, regardless of the type of challenged prosecutorial conduct, necessarily involves the relitigation of the criminal case. In the context of a media claim, the parties would need to evaluate the voir dire testimony of all the jurors from Petitioner's criminal trial to assess their media awareness at the time of the trial. Petitioner would then be required to relitigate the entirety of the evidence utilized against him in the criminal case in order to prove that the jury's failure to acquit was not attributable to the State's evidence, but

rather, to the prosecutor's inflammatory announcement of the indictment. Though such a claim would be undoubtedly difficult to prove, the opportunity to secure dismissal of such a claim early in the litigation would be minimal.[11] Accordingly, such a claim would entangle the prosecutor in the relitigation of the criminal case, in direct contravention of the principles upon which absolute immunity was established. *Imbler*, 424 U.S. at 425-26.

D. Immunizing Respondent Fitzsimmons from Petitioner's Unfair Trial Claim is Consistent with the "Functional Approach"

Petitioner argues that immunity for public statements is inconsistent with the functional approach applied in cases such as *Forrester v. White*, 484 U.S. 219, 227 (1988). However, a closer examination of *Forrester* and other applicable precedent supports, rather than betrays, the court of appeals' focus on the nature of Petitioner's cause of action in assessing the scope of prosecutorial immunity. In *Forrester*, a judge was not entitled to absolute immunity for his administrative act of terminating a probation officer on account of her sex. Notably, the probation officer's injury—deprivation of employment—was unrelated to any pending or contemplated criminal prosecution.

Other scenarios can be imagined, however, in which a judge's termination of an employee would be worthy of absolute immunity under a functional approach. Assume that the probation officer had been terminated in advance of giving testimony favorable to a defendant in a pending criminal matter. After the criminal trial, the criminal defendant sued the judge and the prosecutor, claiming

[11] It would seem pre-trial dismissal would be dependent upon a showing that jurors who voted to convict were not privy to the announcement of the indictment.

that they conspired to fire the probation officer in order to provide the prosecution with ammunition to discredit her testimony at trial.

Under the foregoing scenario, the civil rights claim would be premised on interference with the criminal defendant's right to a fair trial and should fall within the umbrella of immunity. Indeed, such a claim would be virtually identical to the claim in *Imbler* premised upon the prosecutor's efforts to delay an arrest so as to deprive the defense with fodder for impeachment. *See Imbler*, 424 U.S. at 431 n. 32. As implicitly recognized in *Imbler*, preventing such a claim to escape the umbrella of immunity would expose both jurists and prosecutors to frequent retaliatory litigation by criminal defendants targeting out-of-court conspiracies allegedly designed to interfere with the fairness of a trial. *Id.* This example helps illustrate that the degree of immunity to be accorded a particular act may turn upon the nature of the plaintiff's claim.

This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), also provides a useful illustration. The United State's Attorney General was denied immunity for authorizing the installation of illegal wiretaps to seek evidence against persons other than the plaintiff. *Id.* at 520-24. The plaintiff's injury—illegal search and seizure—was completed out of court without regard to the criminal justice process, which was never initiated against him.

Assuming, however, that the plaintiff in *Mitchell* was the target of the criminal prosecution, and that he had sued the Attorney General for introducing illegally intercepted conversations at trial, immunity would surely have applied. Under that hypothetical, any claim that the criminal justice process was tainted through the use of illegally seized evidence would have been redressable during the prosecution. Accordingly, while the targeted illegality was

identical under both scenarios—illegal wiretapping—immunity should apply only where the injury stemmed from the criminal judicial process.

The absence of an out-of-court injury stemming from Fitzsimmons' public statements also undermines Petitioner's efforts to identify a conflict between the lower court's decision and the Eleventh Circuit's decisions in *Stepanian v. Addis*, 699 F.2d 1046 (11th Cir. 1983), and *Marx v. Gumbinner*, 855 F.2d 783 (11th Cir. 1988). Though the Seventh Circuit actually identified such an inter-circuit conflict (J.A. 91), the fact is that none exists because both *Marx* and *Stepanian* involved an injury only to reputation. Neither *Stepanian* nor *Marx* involved the ability of the criminal process to ensure a fair trial, which minimizes the need for exposing prosecutors to damages.[12]

Against that backdrop, the court of appeals' application of immunity to petitioner's unfair trial claim against

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[12] All but one of the remaining cases relied on by Petitioner are also inapposite because they did not involve an injury stemming from a criminal prosecution. *See Marrero v. City of Hialeah*, 625 F.2d 499, 511 (5th Cir. 1980) (defamatory press statements harmed plaintiff's business); *Gobel v. Maricopa County*, 867 F.2d 1201 (9th Cir. 1989) (damage to reputation); *Helstocki v. Goldstein*, 552 F.2d 564 (3rd Cir. 1977) (press leak injured plaintiff's political prospects); *Walker v. Cahalan*, 542 F.2d 681 (6th Cir. 1976) (defamation claim), *cert. denied*, 430 U.S. 966 (1977); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

But see Powers v. Coe, 728 F.2d 97, 103 (2nd Cir. 1984) (denial of a fair trial attributable to prosecutor's covert leaking of secret grand jury information). Note, however, that none of the public policy reasons encouraging prosecutors to publicly announce indictments are furthered through immunizing covert leaks. Moreover, to the extent *Powers* is analogous to the instant case, it is of questionable precedential value in light of the same court's prior decision in *Lee v. Willins*, 617 F.2d 320, 322 (2nd Cir.), *cert. denied*, 449 U.S. 861 (1980) (immunity for even investigative acts which only cause injury through judicial process).

Respondent Fitzsimmons is consistent with and supported by *Forrester*, *Mitchell* and other precedent visiting analogous issues. The functional approach is well served through immunizing prosecutors from claims challenging the decision to indict or to influence the outcome of the trial process, particularly because the alleged misconduct is specifically subject to correction through the procedural safeguards inherent in the criminal justice process.

E. Petitioner's Claims Concerning Press Statements Other Than the Announcement of the Indictment are not Within the Scope of Review

This Honorable Court granted Petitioner's petition for a writ of *certiorari* on two questions, the first involving certain Respondents' involvement in a pre-arrest and pre-indictment investigation; and the second involving Respondent Fitzsimmons' announcement of Petitioner's indictment. The scope of immunity for that conduct has been addressed in arguments I and II *supra*. Petitioner, however, now asks this Honorable Court to address the application of immunity to Respondents' out-of-court press statements (aside from Fitzsimmons' announcement of the indictment). This Honorable Court should decline Petitioner's invitation to expand the scope of review.

Petitioner's complaint alleged that a variety of press statements contributed to his high bail and the deprivation of his right to a fair trial. However, only Respondent Fitzsimmons' announcement of Petitioner's indictment occurred prior to the conclusion of Petitioner's criminal trial, and only it could possibly have contributed to the setting of Petitioner's bail or to any unfairness in Petitioner's trial.[13]

[13] Following the announcement of Petitioner's indictment, the next public statement occurred after the completion of Petitioner's

(Footnote continued on following page)

For that reason, the district court dismissed Petitioner's claims arising from the prosecutors' public statements with the sole exception of Fitzsimmons' announcement of the indictment (*See* J.A. pp. 49-50). Likewise, the Seventh Circuit has twice limited its review in the same fashion (J.A. 89-92; 105-08).

In both of his petitions for a writ of *certiorari*, and in his brief to this Court, Petitioner similarly limited his questions presented for review concerning the publicity issue to Fitzsimmons' announcement of Petitioner's indictment. Accordingly, this Honorable Court should also confine itself to that question.

To the extent this Honorable Court deems Petitioner's unfair trial claim to include press statements other than the announcement of the indictment, absolute immunity should apply to those statements for the same reasons as discussed at pages 28-38 *supra*.

[13] *continued*

trial and involved Prosecutor Thomas Knight's declaration that Petitioner would be retried (*See* J.A. p. 15, para. 58). Petitioner next alleged that Fitzsimmons and Knight made "additional *post-trial* statements" declaring that Petitioner was guilty" (*See* J.A. p. 15, para. 59) (emphasis added). Petitioner also challenged Prosecutor Knight's public statements which discredited Brian Dugan's confessions (*See* J.A. pp. 16-17, para. 65). Dugan did not confess until June of 1985, several months after Petitioner's trial had been completed (*See* J.A. pp. 16-17, paras. 60-61). Next, Petitioner alleged that Prosecutor Robert Kilander deliberately caused a false and inculpatory statement to be published about Petitioner in September of 1985, again several months after Petitioner's trial (*See* J.A. p. 17, para. 68). Finally, Petitioner claims the prosecutors made pretextual public statements explaining the dismissal of the charges in March, 1987 (*See* J.A. p. 18, para. 72).

III. THE COURT SHOULD DECLINE PETITIONER'S INVITATION TO OVERRULE *IMBLER*'S APPLICATION OF ABSOLUTE IMMUNITY TO THE DECISION TO INDICT AND PROSECUTE

A. Petitioner's Claim Concerning Immunity for the Decision to Indict is Beyond the Scope of Review

Petitioner asks this Honorable Court to overrule *Imbler* to the extent it immunizes malicious decisions to indict and prosecute. However, the decisions to indict, prosecute and re-prosecute cannot fairly be characterized as part of the pre-indictment investigation. As with the press statements, therefore, those decisions are in no sense within the scope of review. To the extent this Honorable Court disagrees, Respondents will respond on the merits.

B. Prosecutorial Immunity for the Decision to Indict is Well-Grounded in the Common Law and In Public Policy

The decisions to indict and prosecute lie at the very heart of the prosecutor's role as a judicial officer, and are perhaps the clearest examples of immunized conduct under *Imbler*. Although Petitioner acknowledges that this Court recognized the existence of absolute prosecutorial immunity at common law in *Imbler* and *Yaselli*, petitioner nevertheless contends that immunity should be denied for malicious decisions because no pre-1871 authority immunizes a prosecutor from malicious prosecution claims (Petitioner's Brief, pp. 39-43).

At the outset, Respondents concur with Petitioner that there is no direct authority prior to 1871 finding a public prosecutor absolutely immune for malicious prosecution. In fact, the first reported case addressing the issue was *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896). In holding that a local prosecutor could not be sued at

common law for malicious prosecution, the court in *Griffith* quoted the following passage from Townshend, *Slander and Libel*, § 227, pp. 395-96 (3d Ed. 1877):

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted, but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.

146 Ind. at 121-22. This formulation of absolute immunity "is as old as the common law itself." *Weaver v. Devendorf*, 3 Denio 117, 120 (1846). It "extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power." *Id.*

Whether immunity attached to a public officer's acts at common law depended not on the "name applied to the office or the officer . . . [but rather] the character of the act. If it be judicial or quasi-judicial in its nature, the officer acts judicially and is exempt." *Mechem on Public Officers*, § 638, p. 421 (1890). *Accord Imbler*, 424 U.S. at 430 (applying functional approach to immunity). Conversely, "[w]hen duties which are purely ministerial are cast upon officers whose chief functions are judicial, and the ministerial duty is violated, the officer, although for most purposes a judge, is still civilly responsible for such misconduct." *Rochester White Lead Co. v. City of Rochester*, 3 N.Y. 463, 466-67 (1850).

Given that the common law provided absolute immunity to public officers exercising judicial-like duties, it is not

surprising that courts specifically applied that doctrine to public prosecutors. *See Yaselli*, 12 F.2d at 403; *Watts v. Gerking*, 111 Oreg. 641, 228 P. 135 (1924); *Smith v. Parman*, 101 Kans. 115, 165 P. 663 (1917); *Griffith v. Slinkard*, *supra*. Nor is application of this common law immunity doctrine to prosecutors improper, because " 'the precise contours of official immunity' need not mirror the immunity at common law." *Burns*, 111 S.Ct. at 1943, *quoting Anderson v. Creighton*, 483 U.S. 635, 645 (1987). A prosecutor's decision on whether to prosecute is, at the very least, quasi-judicial. *Imbler*, 424 U.S. at 438; *Yaselli*, 12 F.2d at 404; *Smith*, 101 Kans. at 116. Like judges and jurors, prosecutors "exercise a discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n. 20. Furthermore, the policy reasons which favor giving judges and jurors absolute immunity at common law apply with equally compelling force to prosecutors. *Imbler*, 424 U.S. at 422-23. Given the strong analogies between judges, jurors and prosecutors, it is improbable that an action would lie at common law against a public prosecutor for his malicious decision to prosecute had the issue been squarely presented to a court.

In his brief, however, Petitioner suggests that the quasi-judicial status of a prosecutor, itself, is the very reason why absolute immunity is not available. In support of this suggestion, Petitioner relies heavily on *Newell On Malicious Prosecution* (1892). In this treatise, the author states that a quasi-judicial officer "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be." *Id.* at § 68, p. 166 (footnote omitted). The only authority cited by the author, however, is Mechem's treatise on public officers, which, as stated above, actually sets forth an early formulation of the functional approach to absolute immunity recognized at common law and reaffirmed in *Imbler*.[14]

Petitioner also cites the concurring and dissenting opinion in *Burns* in which Justice Scalia posited that quasi-judicial public officers enjoyed only qualified immunity at common law. *Burns*, 111 S.Ct. at 1947, *citing Billings v. Lafferty*, 31 Ill. 318, 322 (1863) and *Reed v. Conway*, 20 Mo. 22, 44-52 (1854).[15] However, the application of qualified immunity to quasi-judicial officers was anything but uniform at common law, despite the *Reed* court's suggestion that a public officer's responsibility for malicious acts was "clearly established and maintained" in the common law. *Id.* at 44. Indeed, the common law is equally replete with cases holding public officers immune from liability regardless of malicious motives. *See generally*, *Weaver v. Devendorf*, 3 Denio 117, 120 (1846) (and cases cited therein); *Mechem*, § 640, pp. 425-27.

The lack of uniformity in the common law regarding immunity for public officers caused Mechem, in his treatise,

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[14] Petitioner also cites post-1871 case law which allowed individuals to maintain malicious prosecution actions against public prosecutors. However, the only case which actually refers to the immunity doctrine in any meaningful fashion is *Leong Yau v. Carden*, 23 Hawaii 362 (1916). In *Leong Yau*, the court rejected *Griffith v. Slinkard* without any explanation and cited Newell's treatise on malicious prosecution in support of its holding that a public prosecutor, as a quasi-judicial officer, could be sued for malicious prosecution. *Leong Yau*'s holding, therefore, is tenuous and represents an anomaly of the law in light of the overwhelming precedent to the contrary.

[15] The focus of Justice Scalia's dissent in *Burns* was limited to the prosecutor's act of seeking a search warrant, not the prosecutor's decision to seek an indictment. The latter function is clearly in the nature of a judicial duty and, therefore, reflects the prosecutorial activity traditionally afforded absolute immunity.

to declare the area of law uncertain and confusing. *See Mechem*, § 640, p. 424. However, Mechem concluded that the case law granting absolute immunity to public officers is "the better and the safer rule." *Id.* at § 641, p. 427. Elaborating on that conclusion, Mechem stated:

> If the action is really judicial, the immunity which adheres to judicial action should be applied whether the officer sits upon the bench of a regularly established court or not. As has been said, if the action can be maintained by the allegation of improper motives, no litigant will fail to allege that they existed, and the public officer may constantly be called upon to defend himself from actions at law brought with motives fully as malicious as those which are asserted to have inspired him. Public policy, it is believed, requires that *all* judicial actions shall be exempt from question in private suits (emphasis in original) (footnote omitted).

Id.

Clearly, there existed divergent views before 1871 on whether quasi-judicial officers had absolute or qualified immunity from personal liability in civil actions stemming from their official duties. However, for purposes of applying common law immunities in § 1983 actions, there is strong support in the early common law for the proposition that no public official, regardless of title or status, could be held liable in a civil lawsuit for a judicial determination, even if it were alleged that the officer acted maliciously in making that determination. Thus, the absolute immunity accorded public officials at common law and the public-policy reasons underlying that immunity, lend more than adequate support to this Court's immunizing of the decision to indict in *Imbler*.

IV. THIS COURT SHOULD DECLINE PETITIONER'S INVITATION TO OVERRULE *IMBLER* TO THE EXTENT IT IMMUNIZES PROSECUTORS FROM LIABILITY FOR THE SUPPRESSION OF EVIDENCE

Petitioner argues that this Court should overrule *Imbler* and adopt Justice White's concurrence suggesting that immunity be unavailable to claims alleging willful suppression of evidence (Petitioner's Brief, p. 48). Petitioner contends that this case "presents the exact exception articulated by Justice White—Respondents withheld crucial favorable boot print evidence from the grand jury, from the court, and from defense counsel" (Petitioner's Brief, p. 48).

Respondents, however, suggest that this case does not squarely present a question concerning the scope of immunity for the suppression of evidence. In *Imbler*, the plaintiff alleged that he was wrongfully convicted in part due to the suppression of a fingerprint expert's exculpatory opinion. In the present case, by contrast, the Petitioner concedes he "discovered the information independently on the eve of trial." Thus, Petitioner does not have a claim for suppression of evidence at trial based upon *Brady v. Maryland*, 373 U.S. 83 (1963). Moreover, to the extent Petitioner relies upon the withholding of Gorajczyk's opinion from the grand jury, this Court recently confirmed that a prosecutor is under no duty to disclose exculpatory evidence to a grand jury. *United States v. Williams*, 112 S.Ct. 1735 (1992). Accordingly, the absence of a constitutional violation stemming from the alleged suppression of evidence renders it unnecessary for this Court to consider Petitioner's invitation to adopt Justice White's concurrence in *Imbler*.

To the extent this Honorable Court deems the issue fairly presented, Respondents simply point out that the rationale upon which Justice White's concurrence was re-

jected in 1976 still rings true today. *See Imbler*, 424 U.S. at 431 n. 34. In addition, as argued in the context of Petitioner's press claim against Respondent Fitzsimmons, a prosecutor's immunity from claims of malicious prosecution or deprivation of a fair trial flows from the nature of the cause of action, rather than from a strict application of the challenged prosecutorial act. Accordingly, this Court should decline Petitioner's invitation to overrule *Imbler* to the extent it immunizes a prosecutor from liability for the suppression of evidence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

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STEPHEN BUCKLEY,

Petitioner,

vs.

MICHAEL FITZSIMMONS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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INTRODUCTION

The briefs of respondents and Amici misrepresent the facts in this case and the holding of *Imbler v. Pachtman*, 424 U.S. 409 (1976), and swear allegiance to the functions test espoused by *Imbler* whilst abandoning it in fact. In addition, the briefs all but ignore the impact of the expansion of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the enlarged protection against vexatious litigation *Harlow* gives to public officials such as prosecutors, and the corresponding diminution of the importance of affording respondents absolute immunity. At different points, each of these briefs acknowledges that each type of conduct alleged against respondents is not entitled to absolute immunity,[1] and agree on little other than that petitioner should lose. When the facts alleged by petitioner are accepted, as they must be at this stage of the litigation, and the functions test of *Imbler* is applied in a principled manner, it is apparent that respondents are not entitled to absolute immunity for their acts which caused the false arrest and imprisonment of petitioner and denied him a fair trial. Moreover, respondents' concession that immunity for prosecutors was not well established in 1871,[2] if indeed it was established at all, argues forcefully in favor of recognizing a cause of action against

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[1] *See*, Brief of Respondents at 17, "interrogation of witnesses and suspects during a criminal investigation is not fairly characterized as necessary to the judicial phase of the criminal justice process;" Brief of Respondents at 19-20 (suggesting fabrication of evidence not entitled to absolute immunity); Brief of Amicus United States at 12, "Prosecutors are not entitled to absolute immunity for public statements concerning pending litigation."

[2] Brief of Respondents at 44.

prosecutors for a malicious decision to prosecute based on an improper ulterior motive.

FACTS

Petitioner's claim is that respondents directed and participated in a year long pre-arrest and pre-indictment investigation during which they fabricated the case against him, then caused him to be wrongfully imprisoned, defamed him, and destroyed his rights to affordable bond and a fair trial by helping to orchestrate a barrage of prejudicial publicity. Respondents and their Amicus continually attempt to recast this fabrication as preparation for trial, "manipulation" and "evaluation of the evidence," (Brief of Respondents at 19), and as "selecting experts" (Brief of Amicus at 9), but the allegations in the complaint are otherwise. The complaint alleges that respondents paid money to two persons, Hernandez and Cruz, in return for statements that falsely inculpated petitioner (J.A. 11, ¶ 39, 40), and "constructed" and "manufactured" evidence from forensic personnel by persuading them to falsely assert that petitioner's boots made a bootprint on the Nicarico's door. J.A. 7-9, ¶ 23, 25-29, 31; J.A. 14 ¶ 53-55. Sometime after the statemer s and bootprint evidence were concocted, they were presented to the grand jury which indicted petitioner. This was the only "evidence" which incriminated petitioner.[3]

[3] Respondents' assertion that Hernandez voluntarily came forward with statements implicating petitioner in the murder (Brief of Respondents at 20), is completely untrue. Hernandez said only that Buckley was present at a post-murder conversation when the murder was discussed. J.A. 7, ¶ 22.

By no stretch of the imagination could such actions be validly termed evaluation of evidence. The bootprint and boots had no importance absent additional evidence which linked the two. They were like a pile of white powder in a drug case, which proves nothing without testimony as to what the white powder is; or a finger print and a finger which must be linked by forensic testimony to have any probative force whatsoever. By persuading the forensic personnel to falsely state that petitioner's boot made the bootprint, respondents created evidence where none existed before and prepared the groundwork for a prosecutor – be it respondents or others – to later use this evidence to arrest, imprison and prosecute petitioner. Respondents' coercion of false statements from the forensic personnel was not done for the purpose of evaluating the strength of evidence they already had or determining how to present it. It created evidence which could be used in the event charges were brought against petitioner.

It is also incorrect for respondents to assert that the only wrongful acts with which they are charged occurred at the grand jury and the criminal trial.[4] The concoction of false testimony and participation in the prejudicial publicity campaign were no less wrong because they did not immediately cause constitutional injury, just as negligently maintaining an airplane is wrong even though the plane does not crash until some time later, or placing an unreasonably dangerous item into commerce is wrong

[4] *See, e.g.*, Brief of Respondents at 15 (asserting that this case raises the question whether immunity is available to a prosecutor "who participates in the investigative process, but does not engage in any activity which violates the Constitution other than through the grand jury and criminal trial process"); Brief of Respondents at 18 (arguing immunity applicable because the "interrogation (was) not conducted illegally.").

even though injury does not occur until months or years later.

I. RESPONDENTS' INVESTIGATIVE ACTS CAUSED PETITIONER'S FALSE ARREST, IMPRISONMENT AND PROSECUTION AND ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

Respondents' arguments, and the opinions of the Court of Appeals, rest on the erroneous assumptions that petitioner's injury had only one proximate cause – the immunized indictment and prosecution – and that this broke the chain of causation linking petitioner's injuries to respondents' earlier wrongful acts. Both of these assumptions are false, and lead to the logically and doctrinally flawed positions taken by respondents and the Court of Appeals, whereby the place of injury determines what function the prosecutor was performing when he previously did some act, and thus controls immunity.[5]

Judicial proceedings, including indictment and prosecution, do not necessarily absolve from liability a witness or investigator who maliciously participates in those proceedings. *Burns v. Reed*, 111 S.Ct. 1934 (1991); *Malley v. Briggs*, 475 U.S. 335, 340-41 (1985); *Jones v. City of Chicago*, 856 F.2d 985, 993 (CA7 1988); *White v. Frank*, 855 F.2d 956 (CA2 1988); *Dellums v. Powell*, 566 F.2d 167 (D.C. 1977); E. Scalia, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1441-2, 1452-56. These authorities recognize both that injury that occurs within a judicial proceeding may be compensable in a civil suit, and also that such injury is caused by more than those judicial proceedings.

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[5] Amicus United States rejects this "place of injury" test, *sub silentio*, when it contends that prosecutors are not immune for public statements which cause injury in judicial proceedings. Brief of Amicus United States at 21.

Obviously, the judicial proceedings were *one* cause of the injuries suffered by plaintiffs in *Burns*, *Malley*, *Jones*, *White*, and *Dellums*, but another proximate cause, independent of, but acting together with, the judicial proceedings, was some out-of-court act which set into motion, preceded, or succeeded, those proceedings. In *Burns* it was erroneous legal advice that caused a false arrest, a judicially authorized search, and a judicial determination of probable cause which caused four months of incarceration; in *Malley*, it was an arrest without probable cause based on a judicially issued warrant; in *Jones*, it was officers and forensic personnel who concealed evidence and misrepresented facts, causing plaintiff to be falsely arrested, indicted, and prosecuted; in *White*, it was police officers who acted as complaining witnesses; and here, it is prosecutorial investigators who coerced false statements from forensic personnel and purchased false statements from witnesses.

In each case the major part of the injuries caused by the non-immunized act would not have occurred without additional, immunized, actions by prosecutors, judges, or grand juries, but the non-immunized activities were a concurrent cause of the injuries, and the persons responsible for those activities were liable. It is thus clear that no immunity attaches merely because one cause of petitioner's injuries was immunized activities in the judicial process. Because such a thesis is integral to the arguments of respondents and the holding of the Court of Appeals, it is apparent that they are both wrong.

This Court has consistently stressed that an official's immunity depends upon the function he is performing when he commits the challenged act, not his title or position. Since injury sustained in the judicial process may be caused by both prosecutorial and non-prosecutorial acts, this functional approach leads inexorably

to the conclusion that when a prosecutor performs non-immune investigative acts he is liable, even if the injury occurs in the judicial process and is also caused by prosecution or indictment. An investigative act can cause compensable injury in the judicial process; a prosecutor is not immune for an investigative act; therefore, a prosecutor may be liable for injuries sustained in the judicial process which were caused by an investigative act.

It should not affect this syllogism that the person who performed non-immunized acts is the same person who subsequently performs immunized prosecutorial acts. In that case, he is being sued for his non-immune acts, and it would be the height of illogic to suggest that the functional nature of such acts is transformed by the subsequent performance of immunized acts. If this concept were accepted it would poke a large hole in the fabric of this Court's consistent stress on functional analysis. Subsequent acts by the same actor cannot alter the nature of the function the actor previously performed.

The "place of injury" test espoused by respondents and the Court of Appeals thus falls of its own weight, since it cannot comprehend a prosecutor performing different functions at different times, and sweeps too wide to blanket all of a prosecutor's acts with immunity if he or someone else performs a single immunized act which is one cause of an injury. Once this test is discarded and the functions test of *Imbler* re-enthroned, it is evident that respondents did perform investigative acts which were a proximate cause of injury to petitioner and which are not entitled to immunity.

Both respondents and the United States go to great lengths to make this case identical to *Imbler*, and in so doing misrepresent both the facts here and the facts and

holding of *Imbler*. This Court's decision in *Imbler*[6] rested upon allegations that prosecutor Pachtman had conspired with others to unlawfully *charge* and *convict* Imbler, had intentionally or negligently *allowed* a witness to give false testimony, that an *expert* had suppressed evidence, and that Pachtman *used* a police artist's sketch that a police officer had altered to resemble Imbler. *Imbler* at 415-416. Contrary to the claims of respondents and their amicus,[7] the decision did not rest upon any finding that Pachtman conspired to alter the sketch, personally suppressed a finger print expert's exculpatory opinion, or otherwise personally participated in the investigation or in creating false testimony or exhibits.

Moreover, the United States' claim that "*Imbler* holds that a prosecutor is absolutely immune with respect to investigatory activities that cause harm solely because they culminate in a criminal prosecution" (Brief of United States at 19[8]), is directly contradicted by the express

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[6] To the extent the complaint in *Imbler* made factual allegations more expansive than the facts upon which this Court decided the case, it is this Court's opinion which controls. There could be any number of reasons why the facts in the complaint were different from the facts before this Court, based on prior proceedings in the case or the scope of this Court's grant of certiorari. Thus, the complaint in *Imbler* is largely irrelevant at this time.

[7] Brief of Respondents at 20-21; Brief of United States at 17.

[8] This claim parallels the United States' argument in *Burns v. Reed*, which was firmly rejected by the Court, that investigative acts "related to the ultimate decision to prosecute" should be immune. *Burns* at 1944. The argument of Amicus Appellate Committee of the California District Attorneys Association that conduct "related to an adjudicatory proceeding" should be immunized (Brief at 7), has already been rejected by this Court in *Burns*, 111 S.Ct. at 1944, and by implication in *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985), where this Court "found that

words of *Imbler* that "We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler* at 430-31; *see also, Burns v. Reed*, 111 S.Ct. 1934, 1939 (1992). On the other hand, *Imbler* stressed that only activities that were "an integral part of the judicial process" were entitled to immunity, *id.* at 430, and cited with approval several court of appeals decisions upholding liability against prosecutors for their investigative acts which caused injury in the judicial process. *Id.* at 430 n.31.[9] The argument of the United States that *Imbler* has already answered the question of immunity for investigative acts, which this Court granted certiorari to determine, is thus absurd.

While *Imbler* did not attempt to firmly delineate between immunized and non-immunized investigative acts, its language strongly supports denial of immunity for the type of conduct alleged here. *Imbler* noted that the conduct at issue there was an "integral part of the judicial

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the Attorney General 'was not acting in a prosecutorial capacity' and thus was not entitled to the immunity recognized in *Imbler*," "even though the wiretap was arguably related to the criminal prosecution." *Burns* at 1944.

[9] Citing to *Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (CA1 1974) (no immunity for prosecutors who caused false convictions by unconstitutional wiretapping); *Hampton v. City of Chicago*, 484 F.2d 602, 608-609 (CA7 1973), *cert denied*, 415 U.S. 917 (1974) (no immunity for raid to gather evidence of alleged criminal activity which led to false arrest and malicious prosecution); *Robichaud v. Ronan*, 351 F.2d 533, 537 (CA9 1965) (no immunity for prosecutor's attempts to coerce confession during investigation); *Lewis v. Brautigan*, 227 F.2d 124 (CA5 1955) (no immunity for prosecutor for coercing plea by removing plaintiff from jail to a distant prison and intimidating him).

process" and "intimately connected with the judicial phase of the criminal process," *id.* at 430, and suggested that immunity should be imposed where the prosecutor was acting "as an officer of the court." *Id.* at 431 n.33. Though recognizing that the duties of a prosecutor in his role as an advocate could cover "actions preliminary to the initiation of a prosecution and actions apart from the courtroom," *id.* at 431 n.33, the examples of such activities listed by the Court did not include the type of pure investigation alleged against these respondents.[10] The language of the court in *Imbler* is a far cry from its interpretation by respondents and the United States. Under their arguments *any* investigative act by a prosecutor which causes injury in the judicial process is immunized, no matter how distant the act was from the judicial process or how removed the prosecutor was from acting as an officer of the court.[11] The careful distinction made

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[10] Even with respect to many of the prosecutorial functions listed in *Imbler*, the Court declined to determine which were entitled to absolute immunity. *Id.* at 433 n.33.

[11] Respondents' recognition that a prosecutor is *not* immune for using excessive force to obtain evidence (Brief of Respondents at 18), illuminates the contradictions in their argument. The prosecutor is obtaining evidence and causing injury in the judicial process and thus, if respondents are to be faithful to their argument, he *should* be immune. Perhaps aware that licensing the third degree by prosecutors would shock even the hardest heart, respondents shrink from this argument. Nor is it logical to argue that a victim could recover for the physical injuries caused by the beating, but not for the injury caused by use of the coerced confession at trial. Since immunity focusses on the acts performed, it is the act that is either immunized or not, not the injury that results from that act. Thus, if injury in the judicial process immunizes the act the immunity covers all consequences of that act, including the physical injuries caused by the beating.

by *Imbler*, and developed further in *Burns*, between prosecutorial and investigative acts is thus eviscerated.

Imbler recognized that identifying prosecutorial acts entitled to immunity could be "difficult" and eschewed reliance on the facile "place of injury" test. *Id.* at 431 n.33. *Burns* considered the issue further, and held that a prosecutor's acts in advising police, both on how to collect evidence – whether they could interview a witness under hypnosis – and whether they had sufficient probable cause to arrest, were not entitled to immunity, since "advising police in the investigative phase of a criminal case" is not a function "intimately associated with the criminal process." *Burns* at 1942. *Burns* strongly supports the denial of immunity here. Under *Burns*, respondents would not be entitled to immunity for advising the police investigators to purchase false statements and fabricate evidence; they can hardly be entitled to immunity for actively participating in the wrongdoing instead. Respondents' attempt[12] to distinguish *Burns* on the basis of their description of the nature of petitioner's cause of action – false arrest compared to deprivation of a fair trial – is unavailing. Petitioner's complaint includes claims for false arrest and imprisonment, as well as deprivation of fair trial, based upon non-immunized investigative and administrative acts of respondents. Contrary to respondents' contention, false arrest is not restricted to occurrences unmediated by judicial process. *Malley v. Briggs*, 475 U.S. 335.

The Court of Appeals opinion approving immunity for "the entire investigation of a case," J.A. at 92, is inconsistent with *Imbler* and *Burns* and this Court's functional approach to immunity. When viewed in their proper light, the challenged acts of respondents were

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[12] Brief of Respondents at 22.

investigative acts which were not intimately connected to the judicial process. Absolute immunity for these acts is not warranted by history, policy or precedent.

II. RESPONDENTS ARE NOT ENTITLED TO IMMUNITY FOR THEIR DECISION TO PROSECUTE PETITIONER

Respondents have acknowledged that at the time § 1983 was enacted the immunity of prosecutors for malicious prosecution was not well established. Brief of Respondents at 44. Under settled principles of statutory construction this dictates that the clear language of § 1983 should not be read as subject to such an immunity, since "we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy," *Tower v. Glover*, 467 U.S. 914, 922-23 (1984), and "we would be going far to read into (§ 1983) an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Malley v. Briggs*, 475 U.S. at 335, 342 (1985). In light of the expanded protections of qualified immunity now available to prosecutors, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court should restrict *Imbler* to the core conduct alleged against the prosecutor there – the presentation of material in judicial proceedings – and afford prosecutors absolute defamation immunity but only qualified immunity for malicious decisions to indict.

III. RESPONDENTS' PRESS CONFERENCE AND PUBLICITY CAMPAIGN ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

Respondents' argument that they should be absolutely immune for their press conference and publicity campaign is so bereft of support that it has been abandoned by the United States on behalf of its prosecutors. Specifically, the United States concedes, on the basis of this Court's decision in *Burns*, that "a prosecutor's

actions in providing public information, like his actions in providing legal advice to police, would normally appear to warrant only qualified immunity" because "they are not part of the process of 'initiating a prosecution' and 'presenting the State's case' nor are they otherwise 'intimately associated with the judicial phase of the criminal process.' " Brief of United States at 21.

In arguing to the contrary, respondents make several fundamental misrepresentations and unwarranted leaps of faith, and speculate as to what the common law would be "if the issue were fairly presented." Quoting from *Burns* that "the precise contours of official immunity need not mirror the immunity at common law," respondents proceed to characterize petitioner's claim as one of "fair trial," then equate it with malicious prosecution; claim that "at common law immunity was often tied to specific causes of action, and specific actors," and "press conferences and the impact of mass media on fairness of criminal trials were not contemplated by the common law," and therefore conclude, on the basis that judges were traditionally held immune from malicious prosecution claims, that "Petitioner's claim would have been barred by immunity at common law had the issue been squarely presented." Brief of Respondents at 28-30.

First, the thrust of the entire quote from *Burns*, 111 S.Ct. at 1943, is that the common law is a *limitation* on the conferral of absolute immunity, and that this Court does not have a license to impose the view of the scope of immunity that it deems socially desirable. Second, petitioner's publicity claim is more than simply one of fair trial, but includes false arrest, false imprisonment, and defamation plus deprivation of fair trial – claims for which absolute immunity clearly did not apply at common law. Third, an approach that ties immunity to the actor and cause of action is directly contrary to the functional approach established by this Court in *Imbler* and *Burns*. Fourth, as early as 1807, Chief Justice Marshall, in the treason trial of Colonel Aaron Burr, did contemplate

the effect of massive prejudicial publicity on the fairness of high profile trials, 1 *Burr Trial* 413-416 (1807), and this issue was again considered by this court in 1878 in *United States v. Reynolds*, 98 U.S. 145, 155-6 (1878).[13] Finally, while pre-1871 common law supported immunity for judges for malicious prosecution claims, it did not for prosecutors. *See, supra*, at 11; Brief for Petitioner at 40-47.

Respondents also argue that public policy supports the award of absolute immunity for prosecutorial publicity. Public policy alone cannot justify the imposition of absolute immunity. *Malley v. Briggs*. Additionally, absolute immunity for a wrongful and defamatory press conference or publicity campaign will not create an "enormous" risk of vexatious litigation, nor will it have a chilling effect on legitimate prosecutorial conduct. A claim such as set forth by petitioner here is narrowly circumscribed to those circumstances where it can be fairly alleged that the statements of the prosecutor went well beyond the simple announcement of an indictment and created publicity which both defamed plaintiff and so unfairly prejudiced his trial as to deprive him of due process of law. Such circumstances should be the exception, rather than the rule, and would have no effect on the

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[13] During the voir dire in Aaron Burr's trial, one counsel asserted that "he did not believe there was a single man in the state . . . who had not . . . made up and declared an opinion," while another stated that it was "a libel on Virginia . . . to assert that twelve men could not be found . . . with no other knowledge than what they had picked up from newspapers." The presiding Judge, Chief Justice Marshall, then set forth the voir dire and juror bias principles quoted in *United States v. Reynolds*, 98 U.S. at 155. In *Reynolds*, this Court wrote: "In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity and scarcely anyone can be found among those best fitted for jurors which has not read or heard of it and does not have some opinion in respect to its merits." *United States v. Reynolds*, 98 U.S. at 155-6.

prosecutor who confines himself to announcing an indictment.

Respondents also argue that the expanded protections of qualified immunity are "wholly inadequate" to protect prosecutors from the types of claims petitioner asserts against respondent Fitzsimmons. Brief of Respondents at 34. What respondents are, in essence, arguing, is that because their qualified immunity claim would fail, *Harlow* is rendered inadequate. In fact, *Harlow*, as further strengthened by *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), provides prosecutors with more than ample protection from vexatious litigation. The constitutional deprivations asserted here are clearly established only where the prosecutor strays well beyond the announcement of an indictment and makes a prejudicial and defamatory statement which leads to an unfair trial. *See, Irwin v. Dowd*, 366 U.S. 717, 722 (1961). Hence, any narrow, well considered prosecutorial statement announcing an indictment will be afforded qualified immunity. It will only be the false, defamatory, or otherwise wrongfully prejudicial statements which will necessitate further scrutiny. In such infrequent cases, this scrutiny can often be performed on summary judgment – the plaintiff will have to show evidence of unfair trial which was caused, at least in part, by the prosecutor's statements, a difficult burden that many plaintiffs no doubt cannot attain.[14] Hence, it is clear that qualified immunity provides more than adequate protection to prosecutors for claims of prejudicial publicity.

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[14] Here, unlike most cases, the petitioner is able to show that while venue was not moved for his trial, it was moved in the subsequent trials, lending strong factual support for his claim of jury prejudice due to prejudicial publicity.

IV. THE ARGUMENT OF THE UNITED STATES THAT PETITIONER'S PREJUDICIAL PUBLICITY CLAIM DOES NOT ALLEGE A COGNIZABLE CONSTITUTIONAL VIOLATION IS NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED; IF IT IS CONSIDERED IT MUST BE REJECTED AS PETITIONER HAS ALLEGED SEVERAL COGNIZABLE CONSTITUTIONAL CLAIMS

After conceding that *Imbler* and *Burns* dictate that absolute immunity does not lie for out-of-court prosecutorial statements such as those made by respondents herein, the United States, and its prosecutors, raise for the very first time whether petitioner has alleged a cognizable Constitutional claim in connection with these acts. Respondents never raised this issue in their Motions to Dismiss, in either of the Court of Appeals proceedings, in either of their responses to petitioner's Petitions for Certiorari, or in their main brief here. Neither the District Court, nor the Court of Appeals, in any of their opinions, addressed this issue, either directly or indirectly,[15] nor can the questions presented to this Honorable Court for review in either of petitioner's Petitions for Certiorari be fairly read to include this question. For a responding amicus to raise at this late date an issue that was never preserved or raised by any of the parties is manifestly unfair, and asks the Court to violate its own Rule 14.1(a) that "only the questions set forth in the petition (for writ

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[15] The government, in a mighty stretch, attempts to elevate passing references by the Court of Appeals to *Paul v. Davis*, 424 U.S. 693 (1971), as recognition of the issue. This attempt is fanciful, to say the least, and finds no support in either opinion.

of certiorari), or fairly included therein will be considered by the court."[16]

In making its request, the government cites *Siegert v. Gilley*, 111 S.Ct. 1789 (1991). In *Siegert*, unlike here, the Court granted certiorari to decide whether the defendant was entitled to *qualified* immunity, *id.* at 1796, and noted that "A necessary concomitant to the determination of whether the right asserted by a plaintiff is clearly established at the time the defendant acted is the determination of whether plaintiff has asserted the violation of a Constitutional right at all." *Id.* at 1793. Here, the issue is absolute immunity, a question wholly separate from the question of whether plaintiff has alleged a colorable constitutional violation. While resolution of qualified immunity is made by resort to the same decisional law as that which resolves whether there is an underlying constitutional claim, absolute immunity is resolved by a different body of law. Hence, in this case, unlike in *Gilley*, no discussion or analysis of the underlying constitutional claims can be found in any of the decisions or pleadings.[17]

If this Court does consider amicus' new argument, plaintiff offers this necessarily brief response on the merits. Contrary to amicus' assertions, petitioner has set forth several related constitutional claims which arise from the prosecutorial publicity. First, plaintiff has made out a substantive due process claim – a claim which is predicated on "arbitrary and wrongful governmental actions regardless of the fairness of the procedures used

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[16] In addition, certiorari could not have been granted on this question since it was not "pressed or passed upon" by the courts below. *U.S. v. Williams*, 112 S.Ct. 1735, 1739 (1992).

[17] In *Gilley*, the issue of the existence of a clearly established constitutional right was extensively analyzed and decided, presumably after adequate briefing, both by the District Court and the Court of Appeals. *See*, 895 F.2d 797 at 802-803; 692 F.Supp. 1406 at 1411-19.

to implement them." *Zinermon v. Burch*, 494 U.S. 113, 124 (1989), citing *Daniels v. Williams*, 474 U.S. at 331 (1985). Specifically, petitioner has alleged that the arbitrary and wrongful acts of respondents in helping to foment a lynch mob atmosphere were in part responsible for his wrongful imprisonment for three years, facilitated by the mechanisms of a prejudiced bail hearing and trial. *See, Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (CA9 1992). Moreover, again contrary to amicus' assertions, petitioner has alleged that the prejudice occasioned by respondents affected the outcome of the bail determinations and the trial itself;[18] these outcomes, caused by these respondents acting under color of law, are themselves also arbitrary and wrongful governmental actions which also sound in substantive due process.

Additionally, petitioner has alleged related substantive due process claims under the *Paul v. Davis* and *Siegert v. Gilley* defamation plus test. Here, petitioner has more than met the *Paul* requirement as he has alleged defamation which led to a prejudiced bail hearing and trial, which in turn led to wrongful outcomes, and three years of false imprisonment, without probable cause. *See, Buckey v. County of Los Angeles*, 968 F.2d at 795 (CA9 1992).

Additionally, petitioner has also set forth a procedural due process violation in that respondents, by their wrongful publicity, deprived him of a fair and unprejudiced bail hearing, and a fair trial. *See, Brady v. Maryland*, 373 U.S. 83, 86 (1963) (due process violated by prosecutor's misconduct despite appropriate trial procedures afforded to defendant); *see also, U.S. v. Agurs*, 427

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[18] At one point the United States asserts that petitioner cannot challenge the trial outcome because "he was not convicted and the resulting mistrial did not curtail his liberty." Brief of United States at 28. In fact, the opposite is true – an acquittal would have ended the "curtailment of his liberty," but the mistrial enabled respondents to continue their false imprisonment for two more years.

U.S. 97 (1976). A more specific procedural guarantee which underlies this claim is the right to an impartial decision maker, *see, e.g., In re Murchison*, 349 U.S. 133 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *Wolf v. McDonnell*, 418 U.S. 539, 570-1 (1974); *Wang Yang Sun v. McGrath*, 339 U.S. 33 (1950), a guarantee which petitioner alleges was violated by the prejudicial prosecutorial publicity, and which led to his wrongful imprisonment for over three years.

Most significantly, respondents have conceded that petitioner's claim that prosecutorial publicity impaired his right to fair trial constitutes a clearly established due process deprivation. Brief of Respondents at 34. In so doing they rely on *Irvin v. Dowd*, 366 U.S. 717 (1961), a highly charged and publicized serial murder case, where this Court held that a prosecutor's issuance of prejudicial press releases which alleged that the defendant had confessed to the crimes, and the prejudicial publicity which resulted, led to a jury which was not impartial, and hence to a violation of the defendant's due process right to a fair trial.[19]

In an attempt to defeat plaintiff's procedural due process claims, government amicus asks this Court to radically extend this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), by applying it to this case. The unfairness of raising this particular issue now is demonstrated by its complex nature, and its implication of numerous decisions of this Court. The simple response is, however, that such an extension of *Parratt* and *Hudson* to the prosecutors here is completely unwarranted. Specifically, in

[19] Moreover, in his dissent in this case, Judge Fairchild identified a related due process claim, stating that "Prejudicial pretrial publicity may make it more difficult and more expensive for a defendant to protect the fairness of his trial, and I would recognize that as a constitutional wrong for which damages can be obtained. . . . " J.A. 99.

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), and *Zinermon v. Burch*, 494 U.S. 113 (1989), this Court refused to extend *Parratt* to situations where the acts of the offending officials were not "random and unauthorized" but rather were pursuant to established procedures, or otherwise officially authorized. Here, it is uncontested that respondent Fitzsimmons was a policymaker under *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). J.A. at 20-1, 57-60.[20] Hence, his actions were pursuant to established policy and practices and were the antithesis of random and unauthorized acts. Thus, the presence of established procedural safeguards does not preclude petitioner's procedural due process claim.[21]

[20] Respondents have never contested that they were policymakers, only whether they made policy for the County, rather than the State. *See*, J.A. at 57-60.

[21] Similarly, the cryptic reference to procedures in *Baker v. McCollan*, 443 U.S. 137 (1979), is not applicable here. In contrast to *Baker*, petitioner has alleged here that there was no probable cause to arrest and imprison him, that any colorable basis for holding him was fabricated by these same defendants, and that the procedures offered by the state for redress were infected by prejudice caused by these same defendants. In such a circumstance, this Court's dicta in *Baker* that whether continued wrongful confinement becomes a due process violation is dependent upon the procedures provided by the state, has no force, as the procedures have been rendered meaningless by respondents. *See, Malley v. Briggs; Jones v. City of Chicago.*

CONCLUSION

For all the above stated reasons petitioner urges this Honorable Court to reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

Dated: January 27, 1993

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In the Supreme Court of the United States

OCTOBER TERM, 1992

STEPHEN BUCKLEY, PETITIONER

v.

MICHAEL FITZSIMMONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a state prosecutor is entitled to absolute immunity from a Section 1983 damages suit alleging that his pre-indictment investigation and his public statements resulted in wrongful indictment, arrest, and detention pending trial.

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In the Supreme Court of the United States

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STEPHEN BUCKLEY, PETITIONER

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MICHAEL FITZSIMMONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The United States has a substantial interest in questions of prosecutorial immunity. Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued on an implied right of action for violations of constitutional rights. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This Court has indicated that the scope of immunity available to federal officers in such an action is similar to that available to state officials sued under Section 1983. See *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). Thus, the disposition of the issues in this case may

affect the liability of federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

STATEMENT

Petitioner Stephen Buckley challenges a decision of the court of appeals holding that state prosecutors who indicted and tried him are in large part absolutely immune from a suit for damages brought under the Civil Rights Act of 1871, 42 U.S.C. 1983. The court specifically rejected petitioner's contention that a prosecutor is subject to suit for pre-indictment activities, such as interviewing potential expert witnesses, that resulted in petitioner's indictment, arrest, and detention pending trial. The court also rejected petitioner's contention that a prosecutor is subject to suit for public statements that affect the course of the criminal proceedings.

1. As the courts below, we accept as true for present purposes the relevant factual allegations contained in petitioner's complaint. See J.A. 26-38, 69-75.

a. The complaint states that on February 25, 1983, 11-year-old Jeanine Nicarico was abducted from her home in Naperville, Illinois, sexually abused, and murdered. J.A. 6. When her body was found several days later, the DuPage County Sheriff's Office, under the direction of Richard Doria, and the DuPage County State's Attorney's Office, under the direction of respondent Michael Fitzsimmons, launched an intensive investigation into the crime. J.A. 6-7.

Early in the investigation, detectives discovered a bootprint on the door of the Nicaricos' home, and they concluded that the murderer had kicked in the door. J.A. 7. At about the same time, Alex Hernandez, an acquaintance of petitioner's, told investigators that he had overheard a conversation in which petitioner discussed the murder. J.A. 7. Detectives went to petitioner's home and questioned him. He denied any knowledge of the crime and voluntarily gave the officers his boots. J.A. 7. Sergeant John Gorayczky, who worked in the DuPage County Crime Lab, compared petitioner's boots with the bootprint from the Nicaricos' door and concluded that they did not match. J.A. 7-8. Sheriff Doria, State's Attorney Fitzsimmons, and other respondents sought out the opinions of other experts. J.A. 8.

Respondent Edward German, who worked at the Illinois Department of Law Enforcement Crime Lab, determined that petitioner's boots could have made the print. J.A. 8. Respondent Robert Olsen, from the Kansas Bureau of Investigation's Crime Lab, concluded that the boots and the print had "similar class characteristics," but lacked sufficient "individual characteristics" to make a positive identification. J.A. 8-9. Professor Louise Robbins, an anthropologist at the University of North Carolina, declared positively that the boots matched the bootprints. J.A. 9. During that period, the deputy sheriffs and assistant state's attorneys continued to question suspects, including Hernandez and petitioner. Petitioner continued to maintain his innocence. J.A. 9-10.

The DuPage County authorities convened a grand jury to investigate the crime. See Ill. Ann. Stat. ch. 38, para. 112 (Smith-Hurd 1980) (describing composition and impanelment of grand juries). Various suspects, including petitioner, testified. The prosecutors questioned the suspects and presented the bootprint evidence. According to petitioner, they omitted Gorayczky's conclusions, misrepresented those of Ol-

sen and German, and "presented a large amount of obviously incredible, irrelevant, false, and contradictory hearsay and double hearsay evidence designed to improperly prejudice [petitioner]." J.A. 11. The prosecutors also solicited testimony from Hernandez and another suspect, Rolando Cruz, that inculpated petitioner. J.A. 11.

On January 27, 1984, Fitzsimmons publicly stated that the grand jury lacked sufficient evidence to indict. J.A. 11. Nevertheless, on March 9, 1984, the grand jury returned an indictment of petitioner, Hernandez, and Cruz on charges of murder, rape, and burglary. Fitzsimmons, who was seeking renomination for State's Attorney in a local primary election, announced the indictments at a press conference. J.A. 12. He asserted that considerable evidence (including the bootprint evidence) tied petitioner and the other defendants to the crime. Further, Fitzsimmons claimed that the defendants were all part of a burglary ring and released "mug shots" of them. J.A. 12.

b. Illinois law provides that upon the filing of an indictment in open court, "the court shall immediately issue a warrant for the arrest of each person charged with an offense." Ill. Ann. Stat. ch. 38, para. 112-2(d) (Smith-Hurd 1980 & Supp. 1992). Petitioner and his co-defendants were arrested and taken before a judicial officer. Under Illinois law in effect at that time, a person "charged with murder, aggravated kidnapping or treason has the burden of proof that he should be admitted to bail." Ill. Ann. Stat. ch. 38, para. 110-4(b) (Smith-Hurd 1980). The court set bail in the amount of $3 million. J.A. 12-13. Unable to post bail in that amount, petitioner remained in custody. J.A. 14.

Petitioner continued to maintain his innocence, and Hernandez retracted his prior statements, saying he made them to obtain a reward offered for information concerning the crime. J.A. 13. In March 1984, respondent James Ryan defeated Fitzsimmons in the primary election for DuPage County State's Attorney, and Ryan won the general election the following November. J.A. 14. Ryan continued the prosecution in the Nicarico case. In January 1985, a jury was selected and petitioner, Cruz, and Hernandez were tried. Cruz and Hernandez were convicted, but the jury was unable to reach a unanimous verdict concerning petitioner. The court declared a mistrial, and the DuPage County authorities declared publicly that petitioner would be retried. J.A. 14-15.

c. In June 1985, Illinois authorities in Kane and LaSalle Counties charged an individual named Brian Dugan with several sexual assaults, including the rape and murder of a seven-year-old girl. J.A. 15-16. Dugan told his public defender that he had committed not only that crime, but two others, including the rape and murder of Jeanine Nicarico. J.A. 16. In November 1985, DuPage County authorities received the details of Dugan's confession. J.A. 16. Dugan's attorney proposed that Dugan would plead guilty to all three rape-murders in exchange for life sentences. The Kane and LaSalle County prosecutors accepted that offer, but the DuPage County authorities decided instead to reprosecute petitioner for the rape and murder of Nicarico. J.A. 16-17.

The DuPage County authorities continued to detain petitioner during the preparations for a retrial, which was repeatedly postponed. J.A. 16-17. In January 1987, the authorities sought a continuance on the ground that Professor Robbins, a principal ex-

pert witness for the prosecution concerning the bootprint evidence, was seriously ill. Robbins died shortly thereafter, and in March 1987, the DuPage County authorities discontinued petitioner's pretrial detention and prosecution. J.A. 17-18.[1]

2. In March 1988, petitioner filed a six-count civil complaint in the United States District Court for the Northern District of Illinois, seeking damages under federal and state law from DuPage County, its prosecutors, the sheriff and deputy sheriffs, and the expert witnesses. See J.A. 19-24. Count 1, the relevant count for purposes of this case, seeks relief pursuant to the Civil Rights Act of 1871, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1983.

Count 1 alleges that the prosecutors committed acts and omissions that "constitut[ed] false arrest

[1] The Illinois Supreme Court reversed the convictions of Hernandez and Cruz on *Bruton* grounds. See *People* v. *Hernandez*, 521 N.E.2d 25, cert. denied, 488 U.S. 869 (1988); *People* v. *Cruz*, 521 N.E.2d 18, cert. denied, 488 U.S. 869 (1988). The State reprosecuted those defendants. A jury convicted Cruz, and the Illinois Supreme Court has affirmed the jury's sentence of death. *People* v. *Cruz*, No. 70407 (Dec. 4, 1992) [1992 Ill. Lexis 221]. The jury was unable to reach a unanimous verdict with respect to Hernandez. J.A. 73.

and imprisonment," in violation of petitioner's rights under the Fourth and Fourteenth Amendments, and that "violated [petitioner's] right to a fair trial." J.A. 19. It alleges that the acts "were done to publicly prejudice and defame him" and "to cover up the Defendants' failure to solve the crime, to cover up their arrest, imprisonment and prosecution of the wrong men, and to further Defendant Fitzsimmons' and Doria's political career, in violation of [petitioner's] 14th Amendment right to due process of law." J.A. 19.

Count 1 of the complaint also alleges that those "due process violations" resulted in the jury deadlock, "thereby directly causing his continued imprisonment for an additional two years." J.A. 19. It asserts that the DuPage County authorities' "abuse of the grand jury process and its power to indict" violated petitioner's right to counsel and to remain silent under the Fifth, Sixth, and Fourteenth Amendments. J.A. 19. Count 1 further alleges that those acts and omissions, which allegedly were effectuated through a conspiracy, caused petitioner "pain, suffering, fear, mental anguish, humiliation, defamation, loss of work, loss of freedom, and out of pocket costs and expenses." J.A. 20. The complaint seeks $5 million in compensatory damages, and $3 million in punitive damages. J.A. 20.

3. The prosecutors named in petitioner's suit filed a joint motion to dismiss petitioner's action based on prosecutorial immunity. See J.A. 1. The district court granted that motion in large part. The court stated:

> The discussion of prosecutorial immunity must start of course with *Imbler* v. *Pachtman*, 424 U.S. 409 [(1976)], which established that a

> prosecutor is absolutely immune from a suit for damages under 42 U.S.C. § 1983 for alleged violation of constitutional rights committed in "initiating a prosecution and in presenting the state's case."

J.A. 40, quoting *Imbler*, 424 U.S. at 431. Applying the principles set forth in *Imbler*, the court concluded that virtually all of petitioner's allegations of prosecutorial misconduct were based upon actions taken by the prosecutor in "initiating a prosecution and in presenting the state's case." See J.A. 43-45.

The court specifically ruled that the prosecutor's pre-indictment activities, such as "securing opinions as to the value and relevance of existing evidence," were activities associated with the "judicial phase" of the prosecutor's duties and therefore entitled to absolute immunity. J.A. 45. It distinguished, however, the prosecutor's out-of-court public statements on the ground that they are not part of the prosecutor's judicial function and are entitled to only qualified immunity. J.A. 49-51. The court accordingly concluded that the prosecutors were absolutely immune from all of the claims contained in Count 1 of the complaint except "the claim of denial of constitutional right to a fair trial as a result of the pre-trial public announcements of defendant Fitzsimmons." J.A. 53.

4. Both petitioner and Fitzsimmons appealed the district court's immunity ruling. Relying principally on this Court's decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), the court of appeals partly affirmed and partly reversed the district court's rulings. See J.A. 66-100. The court of appeals interpreted *Imbler* to hold that prosecutorial immunity "is absolute

only when the prosecutor performs distinctively prosecutorial functions." J.A. 84. It concluded that distinctively prosecutorial functions" include those " 'prosecutorial' acts" that the "criminal process itself" regulates to prevent harm, "so that damages remedies are unnecessary." J.A. 84-85.

The court suggested a "simple demarcation" between prosecutorial and non-prosecutorial functions:

> If the injury flows from the initiation or prosecution of the case, then the prosecutor is immune and the defendant must look to the court in which the case pends to protect his interests. If, however, a constitutional wrong is complete before the case begins, then the prosecutor should be treated as a police detective would be in like circumstances: qualified rather than absolute immunity.

J.A. 87-88. Thus, prosecutorial acts that "cause injury only to the extent a case proceeds will be brought to heel adequately by the court." J.A. 88, citing *Butz* v. *Economou*, 438 U.S. 478, 515-516 (1978).

The court applied its rule to petitioner's allegations and ruled that the prosecutors, including Fitzsimmons, are absolutely immune from a Section 1983 damages suit based on their public statements in this case. The court concluded that Section 1983 does not provide a cause of action for merely defamatory statements, J.A. 89 (citing *Paul* v. *Davis*, 424 U.S. 693 (1976)), and that the prosecutors are absolutely immune from petitioner's claims that the statements caused additional injury by "influenc[ing] the course of bail hearings or trial," J.A. 92.

The court similarly held that the prosecutors are absolutely immune from petitioner's claims relating

to the bootprint evidence, because "[o]btaining assessments from an expert witness, and preparing that witness for trial, causes no injury apart from what happens in court." J.A. 92-93. The court concluded, however, that petitioner's "allegation that assistant state's attorneys coercively interrogated *him* presents a different problem," because a coercive interrogation may inflict injury apart from the judicial process. J.A. 93. The court ruled that when "the injury from such tactics does not depend on the filing of an indictment or the conduct of trial, the prosecutors have no more than qualified immunity." J.A. 95.[2]

5. Petitioner sought a writ of certiorari, and this Court granted his petition, vacated the decision, and remanded the case for further consideration in light of the Court's decision in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), which held that prosecutors have only qualified immunity when giving legal advice to police. See J.A. 101. On remand, the court of appeals concluded that its prior decision was consistent with *Burns*. The court reiterated its ruling that prosecutors are immune from actions taken in consulting with expert witnesses, because no principled distinction can be made between preparation for trial and the trial itself. J.A. 103-105. The court explained that *Imbler* had recognized that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a

[2] Judge Fairchild dissented in part. J.A. 97-100. He concluded that a prosecutor's creation of prejudicial pretrial publicity may constitute a "constitutional wrong for which damages can be obtained where the prosecutor has acted wrongfully at a stage, such as a press conference, where the purposes to be served by immunity do not apply." J.A. 99-100.

prosecution," J.A. 105, quoting *Imbler*, 424 U.S. at 431 n.33, and that *Burns* had "quoted this language with approval," J.A. 105, citing *Burns*, 111 S. Ct. at 1941-1942.

The court also reiterated its conclusion that petitioner's defamation claims relating to the press conference were not actionable, immunity issues aside, because defamation is not a constitutional wrong under *Paul* v. *Davis*, *supra*. J.A. 105. The court concluded that "*Imbler* confers immunity" with respect to petitioner's additional claim that the resulting pretrial publicity deprived him of a fair bail hearing and trial, because the alleged harm "depends on judicial action." J.A. 106. "Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge." J.A. 106.

The court noted that a memorandum that petitioner filed after remand asserted that one or more of the assistant state's attorneys actually arrested him. The court concluded that a prosecutor's participation in an arrest, like participation in a coercive interrogation, may cause injury independent of the judicial process. The court accordingly modified its judgment to direct the district court to explore the allegation that the persons who arrested petitioner lacked probable cause. J.A. 109.[3]

[3] Judge Fairchild adhered to his earlier view that "there was no absolute immunity for the prosecutor's press conference." J.A. 109. Based on petitioner's allegations that Fitzsimmons played a "very aggressive role" in seeking expert testimony, he additionally expressed doubt that this conduct is entitled to absolute immunity "as a matter of law." J.A. 110.

SUMMARY OF ARGUMENT

Petitioner argues that prosecutors should be subject to a Section 1983 damages suit for a "pre-arrest and pre-indictment investigation" that causes injury during "the later criminal proceedings." Pet. Br. i, 18-34. The court of appeals correctly rejected that argument. This Court held in *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), that a prosecutor is immune from a Section 1983 damages suit for actions taken "in initiating a prosecution and in presenting the State's case." A prosecutor's "pre-indictment" investigatory activities are part of that process of initiating and presenting a prosecution. Indeed, petitioner seeks damages for those activities precisely because they resulted in his indictment, arrest, and detention pending trial.

Petitioner also argues that a prosecutor should be subject to a Section 1983 damages suit for public statements that allegedly caused petitioner injury in "the later criminal proceedings." Pet. Br. i, 18-34. Prosecutors are not entitled to absolute immunity for public statements concerning pending litigation. But even in the absence of immunity, petitioner's claims based on the prosecutor's public statements are not cognizable under Section 1983. To state a Section 1983 claim based on deprivation of liberty without due process of law, petitioner must allege that a state actor actually deprived petitioner of a recognized liberty and that the State's procedures were inadequate to protect petitioner from that deprivation. Petitioner's allegations fail to satisfy those requirements. The only deprivation of a liberty interest involved here—petitioner's pretrial confinement—resulted from the operation of the State's judicial process. Petitioner

has made no allegation that the State's bail procedures were inadequate to prevent prejudicial publicity from unlawfully impairing that interest.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PROSECUTORS ARE NOT SUBJECT TO SUIT UNDER SECTION 1983 FOR PRETRIAL ACTIVITIES THAT ALLEGEDLY INJURED PETITIONER IN THE LATER CRIMINAL PROCEEDINGS

A. Prosecutors Are Absolutely Immune From Suit For Actions Taken In Initiating A Prosecution And In Presenting The State's Case

Petitioner contends that the prosecutors in this case are subject to a Section 1983 damages action based on their "pre-arrest and pre-indictment investigation" that caused injury in "the later criminal proceedings." Pet. Br. i, 18-34. This Court's decision in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), has already resolved that issue. The prosecutors are absolutely immune from petitioner's suit, because the suit seeks damages from the prosecutors for "initiating a prosecution" and "presenting the State's case." *Id.* at 431.

1. The question in *Imbler* was whether "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution is amenable to suit under 42 U.S.C. § 1983 for alleged deprivations of the defendant's constitutional rights." 424 U.S. at 410. The prosecutor, Richard Pachtman, had investigated a homicide and prosecuted Paul Imbler, relying on testimony from the primary identification witness, Alfred Costello. See *id.* at 411-412. After Imbler was convicted, Pachtman learned that Costello "was less trust-

worthy than he had represented originally to Pachtman and in his testimony." *Id.* at 412.

Imbler subsequently obtained release through a writ of habeas corpus. 424 U.S. at 413-415. He then filed a Section 1983 damages action against Pachtman, a police fingerprint expert, and other police officers, alleging that "a conspiracy among them unlawfully to charge and convict him had caused him loss of liberty and other grievous injury." 424 U.S. at 415-416. Imbler's specific allegations were remarkably similar to petitioner's allegations here:

> The gravamen of [Imbler's] complaint against Pachtman was that he had "with intent, and on other occasions with negligence" allowed Costello to give false testimony as found by the District Court, and that the fingerprint expert's suppression of evidence was "chargeable under federal law" to Pachtman. In addition, Imbler claimed that Pachtman had prosecuted him with knowledge of a lie detector test that had "cleared" Imbler, and that Pachtman had used at trial a police artist's sketch of [the victim's] killer made shortly after the crime and allegedly altered to resemble Imbler more closely after the investigation had focused upon him.

Id. at 416. The district court dismissed Imbler's complaint on the ground that Pachtman was protected by prosecutorial immunity, and the court of appeals affirmed. *Id.* at 416.

This Court granted Imbler's petition for a writ of certiorari and affirmed the court of appeals' judgment. It observed at the outset that although Section 1983 contains no express immunities, Congress had included by implication "those immunities which historically, and for reasons of public policy, had been

accorded to various categories of officials." 424 U.S. at 417-418, citing *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). The Court determined that the common law had long recognized "on principles of public policy" that prosecutors are absolutely immune from suits for malicious prosecution. 424 U.S. at 421-422, quoting *Yaselli* v. *Goff*, 12 F.2d 396, 406 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927) (per curiam). It concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S. at 424.

The Court expressly "delineate[d] the boundaries of [its] holding" by reference to the court of appeals' decision, which "emphasized that each of respondent's challenged activities was an 'integral part of the judicial process.'" 424 U.S. at 430, quoting from the lower court's opinion in the same case, 500 F.2d 1301, 1302 (9th Cir. 1974). The Court stated:

> We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force.

424 U.S. at 430. The Court accordingly affirmed the court of appeals' judgment, stating that the prosecutor was immune from a Section 1983 suit for actions taken "in initiating a prosecution and in presenting the State's case." *Id.* at 431.

2. This Court's decision in *Imbler* squarely answers petitioner's argument that the prosecutors in this case are not entitled to absolute immunity for a "pre-arrest and pre-indictment investigation" that injured petitioner in "the later criminal proceedings." Pet. Br. i, 18-34. *Imbler* holds that a prosecutor is abso-

lutely immune from Section 1983 actions "in initiating a prosecution" as well as "in presenting the State's case." 424 U.S. at 431. As the court of appeals recognized, *Imbler* protects a prosecutor from suit not only for seeking an indictment and presenting evidence in court, but also for preparatory activities that cause injury because they culminate in a criminal prosecution. See J.A. 87-88, 103-104.

Petitioner argues that *Imbler* does not control here because a distinction can be drawn between a prosecutor's preparatory actions—specifically the purported "fabrication of evidence"—and the prosecutor's actions at trial. See Pet. Br. 20-21. That distinction is unavailing. Petitioner challenges the prosecutors' "pre-arrest and pre-indictment investigation" precisely because it resulted in an indictment and as a consequence of that indictment he was arrested, detained, and tried. See J.A. 19-20. *Imbler* bars such suits. As the court of appeals explained:

> It would be a hoax to proclaim immunity for presentation of testimony in court if the person aggrieved by that testimony may attack its preparation. Immunity is not limited to *un*prepared events at trial! * * * Immunities cover not only the core functions sought to be protected but also normal preparatory steps.

J.A. 104. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503-507 (1975) (holding that immunity under the Speech or Debate Clause extends to investigative actions "essential to legislating").[4]

[4] This Court explained in *Imbler* that absolute immunity is necessary to the judicial process, because the prosecutor must be free to "exercise his best judgment both *in deciding which suits to bring* and in conducting them in court." 424 U.S. at 424 (emphasis added). The Court specifically noted that "[t]he veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify." *Id.* at 426. "If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence." *Ibid.*

Indeed, *Imbler* expressly addresses petitioner's argument. Imbler's complaint alleged that Pachtman, a forensic expert, and law enforcement officers engaged in a conspiracy "unlawfully to charge and convict." 424 U.S. at 415-416. See also First Amended Complaint, reproduced in 74-5435 J.A. 61-81. Imbler specifically asserted that Pachtman had acted with malice or negligence in preparing his prosecution, because he failed to investigate adequately Costello's credibility and he participated in the suppression or alteration of evidence. See p. 14, *supra*. See also 74-5435 J.A. 63, 64-69, 74, 76, 79.[5] The Court nevertheless affirmed Pachtman's entitlement to absolute immunity, holding that the specific instances of alleged prosecutorial misconduct "were intimately associated with the judicial phase of the criminal process, and thus were functions to which

[5] Significantly, Imbler's complaint charged that Pachtman participated in the conspiracy "commencing in January of 1961"—the date of the murder. 74-5435 J.A. 61, 63. The complaint stated that "[a]t all times during the said trial, and at times during the pre-trial investigatory phase thereof," Pachtman "direct[ed] police officers in traditionally exclusive police activity" and "was aided by officers doing acts within their agency." *Id.* at 69. The complaint also specifically alleged that Pachtman was not entitled to immunity because he was "acting as a police officer and directing police officer[s]." *Id.* at 70.

the reasons for absolute immunity apply with full force." 424 U.S. at 430.[6]

Imbler's complaint and petitioner's complaint are not materially different. Like Imbler, petitioner alleges that prosecutors, law enforcement personnel, and forensic experts "individually and in conspiracy, fabricated evidence against him and wrongfully arrested, imprisoned and prosecuted him." Pet. Br. 3; see J.A. 19-20. Both complaints allege that the prosecutors participated in procuring false testimony or exhibits and suppressing exculpatory evidence. Compare 424 U.S. at 416 with Pet. Br. 4-5; J.A. 7-11. The same result should obtain in both cases: The prosecutors are absolutely immune from a Section 1983 suit for "initiating a prosecution" and "presenting the State's case." *Imbler*, 424 U.S. at 431.[7]

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[6] As the Court explained, "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom." 424 U.S. at 431 n.33. "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence." *Ibid.* The Court nevertheless recognized that a prosecutor enjoys absolute immunity with respect to many of those matters. See 424 U.S. at 430 n.32 (holding that the prosecutor's out-of-court "effort to control the presentation of his witness' testimony" is "a task fairly within his function as an advocate"); *id.* at 431 n.34 (holding that absolute immunity applies to claims of suppression of evidence).

[7] That result is consistent with the underlying purpose of absolute immunity: to protect the integrity of the judicial process. See *Imbler*, 424 U.S. at 422-423. The courts must rely on a public officer—the prosecutor—to make the initial inquiry into allegations of criminal misconduct and to determine

As the Court recognized, the prosecutor's immunity for pre-indictment actions is not all-encompassing. "At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court." *Imbler*, 424 U.S. at 431 n.33.[8] "Drawing a proper line between these functions may present difficult questions," *ibid.*, but it presents no difficulty in this case. At a minimum, *Imbler* holds that a prosecutor is absolutely immune with respect to investigatory activities that cause harm solely because they culminate in a criminal prosecution. That holding controls this case.[9]

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whether to initiate a criminal prosecution. The process will suffer if the prosecutor may be sued based on his evaluation of the evidence. See 424 U.S. at 426-427. The complaints filed in these cases illustrate the need for immunity. In *Imbler*, the plaintiff argued that Pachtman should have conducted a *more* aggressive investigation into Costello's background, see *id.* at 414 n.8, 416, while in this case, petitioner argues that the prosecutors were *too* aggressive in seeking out expert witnesses, see J.A. 8-9.

[8] For example, this Court ruled in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), that a prosecutor is absolutely immune when "appearing before a judge and presenting evidence in support of a motion for a search warrant," *id.* at 1942, but not when "giving legal advice to the police," *id.* at 1944-1945. Similarly, the court of appeals held in this case that the prosecutors are not absolutely immune from allegations that they "coercively interrogated" petitioner, J.A. 93, or that they actually participated in an unlawful arrest, J.A. 109.

[9] Petitioner responds to *Imbler* in part by arguing, in effect, that it should be overruled. Petitioner asserts that "the Court should hold that a public prosecutor's malicious decision to seek an indictment, in the absence of probable cause, but

B. Respondent Fitzsimmons Is Not Subject To Section 1983 Liability For His Public Statements Where The Alleged Deprivation Of Liberty Is Attributable To The Operation Of The State's Judicial Process

Petitioner also contends that former State's Attorney Fitzsimmons is subject to a Section 1983 damages action based on his "out of court public statement[s]" that caused injury in "the later criminal proceedings." Pet. Br. i, 18-34. The court of appeals was correct in concluding that the prosecutor is not subject to suit for those statements. We disagree, however, with the court's characterization of the issue as one of "absolute immunity." J.A. 106-109. The prosecutor's protection from suit in this situation arises not from the Court's recognition that Section 1983 contains implicit immunities, but rather from the explicitly limited reach of Section 1983 to the conduct at issue.

1. a. Section 1983 provides a damages remedy against individuals who, acting under color of state law, deprive another of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. See, *e.g.*, *Soldal* v. *Cook County*, No. 91-6516 (Dec. 8, 1992), slip op. 4 n.6. As this Court recently explained in *Burns* v. *Reed*, 111 S. Ct. 1934 (1991), Section 1983 "is to be read 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" 111 S. Ct. at 1938, quoting *Imbler*, 424 U.S. at 418. Hence, courts ordinarily examine whether immunity exists as part of the inquiry into whether the plaintiff has stated a valid claim for relief.

As we have explained, *Imbler* makes clear that a prosecutor is immune from a Section 1983 suit for investigatory actions that cause harm solely because they result in a prosecution. See pp. 13-19, *supra*. The same cannot be said with respect to a prosecutor's public statements at a press conference. A prosecutor's public statements may serve an important community function by providing official information of public interest, but they are not part of the process of "initiating a prosecution" and "presenting the State's case," nor are they otherwise "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430-431. A prosecutor's actions in providing public information, like his actions in providing legal advice to police, would normally appear to warrant only qualified immunity. See *Burns* v. *Reed*, *supra*.

b. A conclusion that absolute immunity is unavailable—or that even qualified immunity is unavailable—does not mean, however, that petitioner's claim is actionable under Section 1983. As this Court has explained in other Section 1983 suits, the "initial inquiry" must focus on whether the conduct complained of "deprived a person of rights, privileges,

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with the presence of an improper ulterior motive, is actionable." Pet. Br. 45. That result would invalidate *Imbler*'s precise holding that a prosecutor is immune "in initiating a prosecution *and* in presenting the State's case." 424 U.S. at 431 (emphasis added). As this Court has explained, respect for controlling precedent is a "cardinal and guiding principle" in statutory interpretation. *California* v. *FERC*, 495 U.S. 490, 499 (1990). No reason exists to depart from that principle here. See, *e.g.*, *Hilton* v. *South Carolina Public Rys. Comm'n*, 112 S. Ct. 560, 565 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); see also *Burns*, 111 S. Ct. at 1949 (Scalia, J., concurring in part and dissenting in part).

or immunities secured by the Constitution or laws of the United States." *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981). Cf. *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1794 (1991) (affirming the dismissal of a *Bivens* complaint on qualified immunity grounds, because "Siegert not only failed to allege the violation of a constitutional right that was clearly established at the time of Gilley's actions, but he failed to establish the violation of any constitutional right at all").

This Court's decision in *Baker* v. *McCollan*, 443 U.S. 137 (1979), has particular relevance to that inquiry in this case, wherein petitioner alleges "false arrest and imprisonment, in violation of [petitioner's] fourth and fourteenth amendment rights." J.A. 19. In *Baker*, the plaintiff brought a Section 1983 suit predicated on wrongful arrest and detention. The Court explained that "the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty." 443 U.S. at 142-143, citing *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). See also *County of Riverside* v. *McLaughlin*, 111 S. Ct. 1661 (1991). It further stated:

> Since an adversary hearing is not required, and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him during trial.

443 U.S. at 143. In those circumstances, a Section 1983 action predicated on a Fourth Amendment violation must focus "on the validity of the warrant under which he was arrested." *Ibid.*[10]

The Court also explained, however, that a suspect cannot be "detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment." 443 U.S. at 144. It observed:

> We may even assume, *arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law."

Id. at 145. It emphasized, however:

> The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished "without due process of law."

Ibid. The Court concluded that the plaintiff in that case, who was arrested on a warrant and detained without a judicial hearing for three days, was "deprived of no rights secured under the United States Constitution" and therefore had "no claim cognizable under § 1983." *Id.* at 146-147.

2. Petitioner's allegations concerning Fitzsimmons' public statements do not satisfy the requirements that *Baker* identifies as essential for stating a

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[10] "The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released." 443 U.S. at 145.

claim cognizable under Section 1983. Petitioner's complaint alleges violations of the Fourth and Fourteenth Amendments on the ground that the prosecutors' acts and omissions—presumably including Fitzsimmons' statements—led to his "false arrest and imprisonment," "violated [petitioner's] right to a fair trial, were done to publicly prejudice and defame him," and "caus[ed] his continued imprisonment." J.A. 19. But taking the factual allegations of petitioner's complaint as true, Fitzsimmons' public statements did not as a matter of law deprive petitioner of any interest protected by the Fourth or Fourteenth Amendment.

a. Fitzsimmons' statements plainly provide no basis for petitioner's Fourth Amendment claim relating to his "false arrest." According to petitioner's complaint, the grand jury indicted petitioner *prior* to Fitzsimmons' statements. J.A. 12. The indictment supplied probable cause for the arrest. Indeed, Illinois law provides that upon the filing of an indictment in open court, "the court shall immediately issue a warrant for the arrest of each person charged with an offense." Ill. Ann. Stat. ch. 38, para. 111-2(d) (Smith-Hurd 1980 & Supp. 1992). Thus, Fitzsimmons' statements announcing the indictment are factually and legally irrelevant to any Fourth Amendment claim. See *Baker* v. *McCollan*, *supra*.

b. Fitzsimmons' statements also do not support petitioner's claim under the Fourteenth Amendment alleging defamation. As the court of appeals concluded—and petitioner now concedes, Pet. Br. 39—Fitzsimmons' statements are not actionable under Section 1983 to the extent they merely defamed him. See J.A. 89, 105-106. This Court recently reiterated

that mere "injury to reputation" does not invade a "liberty" interest protected by the Fourteenth Amendment. See *Siegert*, 111 S. Ct. at 1794; *Paul* v. *Davis*, 424 U.S. 693, 708-709 (1976). "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *Siegert*, 111 S. Ct. at 1794.

c. Petitioner's claim that Fitzsimmons' statements influenced his bail also fails to identify a constitutional deprivation. To be sure, a criminal defendant has a constitutionally recognized liberty interest in freedom from confinement. See *United States* v. *Salerno*, 481 U.S. 739, 746-752 (1987). The Fourteenth Amendment is implicated, however, only when the deprivation of that liberty interest is accomplished "without due process of law." *Baker*, 443 U.S. at 145. As this Court indicated in *Baker*, the question whether the deprivation of liberty amounts to a Fourteenth Amendment violation "depend[s] on what procedures the State affords." *Ibid.*

This Court has repeatedly held that a Section 1983 plaintiff cannot sue a state actor based on an alleged deprivation of the plaintiff's property without due process of law if the State has put in place adequate pre-deprivation procedures or has provided an adequate post-deprivation remedy. See *Hudson* v. *Palmer*, 468 U.S. 517, 530-536 (1984) (post-deprivation remedy for intentional destruction of property); *Parratt* v. *Taylor*, *supra* (post-deprivation remedy for negligent destruction of property); see also *Parratt*, 451 U.S. at 537-538 (discussing pre-deprivation "process"). As *Parratt*'s citation to *Baker* suggests, 451 U.S. at 537, the same principle should apply to alleged deprivations of liberty without due process of law.

Under the analysis set forth in those cases, petitioner cannot maintain a Section 1983 action by simply alleging that Fitzsimmons made prejudicial statements and that those statements were the cause in fact of petitioner's detention pending trial. To state a Fourteenth Amendment claim, he must also allege that his freedom was restrained "without due process of law." As this Court emphasized in *Parratt*, a challenge to the adequacy of the State's procedures is crucial to a Section 1983 "due process" claim. See 451 U.S. at 543-544. Furthermore, once such a challenge is made, the inquiry is whether the State's procedures satisfy the Fourteenth Amendment:

> Although the state remedies may not provide the [plaintiff] with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process.

451 U.S. at 544. See also *Hudson*, 468 U.S. at 533-536.

In this case, petitioner's suit cannot go forward without a colorable claim that Illinois has failed to provide adequate procedures to protect against the setting of oppressive bail in response to pretrial publicity. Petitioner has made no such claim. The court of appeals seemed to recognize that defect, but characterized the issue as one of absolute immunity.. See J.A. 90, 106 ("Fitzsimmons' press conference could cause no *actionable* harm without the mediation of a judge."). It is more accurate to say that petitioner's bail claim is defective for the same reason as his

defamation claim—it fails to state a cause of action cognizable under Section 1983.[11]

d. Petitioner's claim that he was denied a "fair trial" is similarly flawed. The Fourteenth Amendment does not contain an abstract guarantee of a "fair trial." Rather, it provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." When the State seeks to impose criminal punishment, a "fair trial" is the process that is due. See *Baker*, 443 U.S. at 145. In this case, petitioner cannot claim that Fitzsimmons' statements deprived him of any liberty interest based on

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[11] The Due Process Clause allows courts to detain criminal suspects pending trial, based on either the suspect's risk of flight or the danger he poses to others. See *United States* v. *Salerno*, *supra*. Significantly, Illinois law provides extensive procedural protections to a suspect in the bail process. See Ill. Ann. Stat. ch. 38, para. 110-1 to 110-18 (Smith-Hurd 1980 & Supp. 1992). The law in effect at the time petitioner was arrested directed the court to set bail in an amount that "shall be: (1) Sufficient to assure compliance with the conditions set forth in the bail bond; (2) Not oppressive; (3) Commensurate with the nature of the offense charged; (4) Considerate of the past criminal acts and conduct of the defendant; and (5) Considerate of the financial ability of the accused." Ill. Ann. Stat. ch. 38, para. 110-5(a) (Smith-Hurd 1980). At the time of petitioner's arrest and thereafter, Illinois law has provided mechanisms for granting, reducing, increasing, or denying bail during the judicial proceedings. See Ill. Ann. Stat. ch. 38, para. 110-6 (Smith-Hurd 1980 & Supp. 1992). Furthermore, a detained defendant could obtain review of the bail decision either through habeas corpus, see *People* v. *Harris*, 232 N.E.2d 721 (Ill. 1967), or through statutory review mechanisms, Ill. Ann. Stat. ch. 38, para. 110-6.1(g) (Supp. 1992). Petitioner's complaint does not acknowledge those protections or allege that they were inadequate to prevent prejudicial pretrial publicity from impairing the bail decision.

the outcome of his criminal trial, because he was not convicted. The jury failed to reach a unanimous verdict and the resulting mistrial did not curtail petitioner's liberty.[12]

Even if petitioner had been convicted, the mere allegation that the prosecutor made prejudicial pretrial statements would be insufficient to state a Section 1983 "due process" claim. Like a challenge to his bail, petitioner's challenge to a sentence of imprisonment could not go forward without a colorable claim that Illinois has failed to provide adequate procedures to prevent pretrial publicity from impairing a defendant's liberty interest. See *Hudson*, 468 U.S. at 533-536; *Parratt*, 451 U.S. at 543-544. As the court of appeals recognized, the courts have various mechanisms at their disposal to prevent pretrial publicity from prejudicing a defendant's rights. See J.A. 90. Petitioner has made no claim that the procedures Illinois provides are ineffective.[13]

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[12] Although petitioner's complaint alludes to the expense and mental anguish he experienced in defending himself in a criminal action, J.A. 20, those costs are an unavoidable part of the trial process. This Court has never held that a criminal suspect has a constitutionally protected liberty interest in freedom from such costs. Cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("the expense and annoyance of litigation is 'part of the social burden of living under government'") (quoting *Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938)).

[13] Trial courts exercise broad power and wide discretion in ensuring that jurors are able to discharge their obligations impartially. See, *e.g.*, *Mu'Min* v. *Virginia*, 111 S. Ct. 1899, 1906 (1991); Ill. Ann. Stat. ch. 38, para. 114-6 (Smith-Hurd 1980 & Supp. 1992) (change of venue provisions). Indeed, for that reason, a convicted defendant may obtain reversal of a trial court's findings of juror impartiality "only for manifest error." *Mu'Min*, 111 S. Ct. at 1907, quoting *Patton* v. *Yount*, 467 U.S. 1025, 1031 (1984). It would be anomalous if a defendant who was *not* convicted could nevertheless seek damages from state actors under Section 1983 by merely alleging prejudicial pretrial publicity without regard to the procedures that the State has put in place to ensure an impartial jury.

Simply put, even if petitioner's allegations relating to Fitzsimmons' public statements are true, they fail to show that petitioner was deprived of liberty "without due process of law." Petitioner's arguments (Pet. Br. 28-30) that a Section 1983 action is needed to deter prosecutors from creating adverse publicity are beside the point. Section 1983 provides a damages remedy only where the plaintiff alleges a constitutional wrong, and petitioner's contentions concerning Fitzsimmons' statements fail to state an actionable claim.[14]

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[14] Mechanisms other than damage remedies are available to prevent pretrial publicity from affecting the outcome of judicial proceedings. For example, Justice Department regulations strictly limit the public announcements of federal prosecutors. See 28 C.F.R. 50.2. And in addition to the court's power to protect a defendant from adverse publicity through "voir dire, change of venue, jury instructions and, in extreme cases, reversal," a court may subject prosecutors to disciplinary proceedings in appropriate cases. *Gentile* v. *State Bar*, 111 S. Ct. 2720, 2748 n.6 (1991) (Rehnquist, C.J., concurring in part and dissenting in part).

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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NO. 91-7849

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

STEPHEN BUCKLEY,
Petitioner,

v.

J. MICHAEL FITZSIMMONS, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[redacted]
AMICUS CURIAE BRIEF IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL., AND
AMICUS CURIAE BRIEF IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL.

Appellate Committee of the California District
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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
IN SUPPORT OF
J. MICHAEL FITZSIMMONS, ET AL.

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, is filing this brief accompanied by the written consent of all parties to the above-entitled case (see: Rule 37.3, Rules of the Supreme Court of the United States). Additionally, pursuant to Rule 37.5, consent to the filing of a brief of an *amicus curiae* is not necessary when, as here, the brief is presented on behalf of a political subdivision of a state. The present brief is submitted on behalf of the 58 county district attorney offices in California through the California District Attorneys Association.

INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of the State of California. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases and prosecutors. Upon review of the instant matter -- which raises the question concerning the scope of prosecutorial immunity -- the Committee has concluded that the outcome of this case shall likely have a substantial impact upon prosecutors and the administration of criminal justice throughout California. It is for this reason that the Committee has filed an *amicus curiae* brief herein.

BRIEF OF *AMICUS CURIAE*

SUMMARY OF ARGUMENT

Consistent with this court's previous decisions regarding prosecutorial immunity, absolute immunity should apply to alleged constitutional violations arising during judicial proceedings that resulted from a prosecutor's conduct in investigating and preparing for a case to be presented before the grand jury and court. Similarly, a prosecutor's conduct in making post-indictment extra-judicial statements to the media which allegedly results in depriving a criminal defendant of a fair trial should be entitled to absolute immunity. The bases for these conclusions are that (1) the above-mentioned conduct was related to adjudicatory proceedings, (2) absent absolute immunity, prosecutors would likely face harassing or retaliatory lawsuits, and (3) judicial safeguards are available as a means of controlling the alleged constitutional violations caused by the prosecutor. See *Butz v. Economou*, 438 U.S. 478, 512 (1978).

The petitioner's reliance upon the rule applicable to the investigatory and administrative functions of a prosecutor is misplaced since the gravamen of this case is whether the prosecutor's conduct should be categorized as quasi-judicial or investigatory/administrative. Petitioner mistakenly focuses upon the act committed by the prosecutor as opposed to the function he is attacking in seeking legal redress. Since the petitioner has focused his claim on injuries arising in the judicial arena, he is attacking the quasi-judicial function of the prosecutor. Had the petitioner focused his claim on constitutional injuries arising outside of the judicial forum which were directly caused by the prosecutor, *amicus curiae* concedes that such a complaint would attack the investigatory or administrative function of the prosecutor and thus not be protected by absolute immunity.

ARGUMENT

Prosecutorial immunity was created by analogizing the prosecutor's discretionary authority to that of a judge and characterizing the prosecutor as a quasi-judicial officer. *Imbler v. Pachtman*, 424 U.S. 409, 422-423 (1976); *Yaselli v. Goff*, 12 F.2d 396, 404 (2nd Cir. 1926), affirmed *per curium*, 275 U.S. 503 (1927).[1] The common law origin of prosecutorial immunity implies that absolute immunity for purposes of 42 U.S.C. section 1983 is limited to quasi-judicial functions that must be protected from retaliatory lawsuits in order to encourage unbiased

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[1]In 1977 Congress considered amending 42 U.S.C.S. section 1983 to delineate the circumstances where prosecutors would be liable for monetary damages. The proposed subsection (e) to section 1983 provided:

> A prosecuting attorney who prosecutes any citizen of the United States or other person within the jurisdiction thereof, under color of any statute, ordinance, regulation, custom, or usage of any State or territory, or of the District of Columbia, shall be liable for monetary damages to any aggrieved party, on account of his actions or omissions in the course of the prosecution, if, but only if --
> (1) he conducts the prosecution in a manner that violated the criminal defendant's rights to due process of law under the fifth or fourteenth amendment of the Constitution, or would have violated such rights if the defendant had been convicted, or, sentenced, but, was not, or by mesne process therein;
> (2) he knows or reasonably should, know that his conduct would deprive the criminal defendant of due process of law under the circumstances described in subsection (a) of this section; and
> (3) his conduct consists of suppressing, concealing, destroying, altering, or failing to make timely disclosure of evidence or investigative leads to evidence.
> (4) This subsection shall not be construed as affecting in any way either --

decision making. In *Imbler v. Pachtman, supra*, the court focused on the function a prosecutor was performing in determining whether absolute immunity should attach. The petitioner seizes upon the distinction made between the investigatory and quasi-judicial functions of the prosecutor and argues that the conduct at issue in this case falls in the former category. The analysis employed by the petitioner focuses on the actions committed by the prosecutor as opposed to the function he is attacking in seeking legal redress.

The strict functional test employed by the petitioner is inadequate to deal with prosecutorial acts which serve multiple functions. Many

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(A) the liability of a prosecuting attorney for acts or omissions that are not within the scope of his functions in the course of a criminal prosecution, or
(B) the liability of any other person than a prosecuting attorney, under any provision of law.

S. 35, 95th Cong., 1st Sess. (amend. 1426, Oct. 6, 1977).

In light of criticism the bill received during committee hearings, it was rejected. See discussion of legislative history in Prosecutorial Immunity: No Place for Absolutes, U. Ill. L.Rev. 977, 989-990 (1983). By rejecting the above amendment to section 1983 which would have subjected prosecutors to lawsuits for conducting prosecutions in a manner that violated a defendant's due process rights, the Congress evidenced its intent to allow for absolute immunity concerning some of the claims brought by the petitioner.

Post enactment legislative history is entitled to little if any weight in determining the meaning of an existing statute. *Blanchette v. Conn. General Insurance Corps.*, 419 U.S. 102, 132 (1974). However, the above subsequent legislative history does indicate the legislature's current intent regarding the scope of absolute immunity for prosecutors which is relevant to whether such immunity "is justified by overriding considerations of public policy." *Forrester v. White*, 484 U.S. 219, 224 (1987).

prosecutorial acts encompass quasi-judicial, investigative or administrative functions. See *Mancini v. Lester*, 630 F.2d 990 (3d Cir. 1980); *Wilkinson v. Ellis*, 484 F.Supp. 1072 (E.D. Pa. 1980).[2] Where a prosecutor's conduct serves both a quasi-judicial and investigative function, the function focused upon determines whether the prosecutor is entitled to absolute immunity. For this reason, the test employed by the petitioner which merely focuses upon the act, is inappropriate for determining the appropriate degree of immunity for multifaceted prosecutorial conduct.

It is easy enough to recite the rule that absolute immunity applies to quasi-judicial acts while qualified immunity applies to investigatory or administrative acts. The real gravamen of the immunity test is in determining the category of the challenged conduct. The court's decision in *Butz v. Economou*, 438 U.S. 478 (1978) provides assistance in resolving the "categorization" issue. In *Butz, supra*, the court compared Department of Agriculture officials conducting administrative hearings to prosecutors. *Id.* at 515. The court granted these officials absolute immunity for exercising discretion similar to that exercised by prosecutors. The court identified three factors to be considered in determining whether absolute immunity existed: (1) whether the discretionary conduct was related to adjudicatory proceedings, (2) whether absent absolute immunity the official would likely face harassing or retaliatory lawsuits, and (3) whether judicial safeguards were available

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[2]The functions of a prosecutor may be divided into seven categories: (1) quasi-judicial, (2) executive or administrative, (3) investigatory, (4) ministerial acts, (5) civil/advisory, (6) public official acts, (7) individual and campaign acts. Note, Deliminating the Scope of Prosecutorial Immunity from Section 1983 Damage Suits, 52 N.Y. U. L. Rev. 173, 187-188 (1977).

as a means of controlling unconstitutional conduct. *Id.* at 512. Notably, the third prong of this test was cited with approval in the court's most recent opinion on prosecutorial immunity. *Burns v. Reed*, 114 L.Ed.2d 547, 562, 565 (1991). Prosecutorial conduct which satisfies the above-mentioned three-part test should be characterized as quasi-judicial and entitled to absolute immunity.

Clearly, the conduct of the prosecutor in this case in preparing for grand jury proceedings satisfies the test set forth above. Such conduct was related to an adjudicatory proceeding. Absent immunity for such conduct, prosecutors would be subjected to retaliatory lawsuits. Finally, judicial safeguards were available to redress the alleged constitutional violation caused by the prosecutor. As noted in respondent's brief, there were many procedural safeguards which Buckley could have employed to ensure his right to a fair trial. Since the harm complained of by the petitioner allegedly occurred within the judicial forum, the third prong of the test announced in *Butz* and approved in *Burns* is satisfied.

In analyzing the prosecutor's post-indictment statement to the media under the above-mentioned test, it is clear that this conduct is also entitled to absolute immunity. The statements to the media were closely related to an adjudicatory proceeding (the grand jury proceeding), absent immunity for such conduct, prosecutors would likely face harassing or retaliatory lawsuits, and judicial safeguards were available as a means of controlling the constitutional violation complained of by the petitioner. Notably, the constitutional violations complained of by the petitioner concerning the post-indictment statements to the media are the right to an impartial jury and a fair trial. Again, by basing his

claim on alleged constitutional violations which occurred in judicial proceedings (and which could have been controlled by the judiciary) the petitioner has focused his grievance on a quasi-judicial function of the prosecutor. Had the petitioner based his claim on some constitutional injury occurring separate and apart from the court proceedings, which was directly caused by the prosecutor, the above-mentioned test would not be satisfied and the prosecutor would only be entitled to qualified immunity.

A prosecutor has a duty to inform the public regarding cases which are pending in his office. *United States v. McNeill*, 728 F.2d 5, 11-12 (1st Cir. 1984); *Foster v. Pearcy*, 387 N.E. 2d 446, 448-449 (1979), cert. denied 445 U.S. 960; ABA Formal Opinion 199 (1940). Some states impose a statutory duty on prosecutors to disclose information to the media regarding the government's business. See Cal. Gov. Code sections 6250, 54950. It would be incongruous to impose a duty on prosecutors to disclose information to the media regarding pending cases while at the same time exposing them to civil suits for such conduct. Access to information regarding the government's business is a right the media and public jealously guard. Abolishing absolute immunity for providing such information to the media and public would unnecessarily chill the dissemination of information by prosecutors and interfere with the public's right to obtain such information.

The above conclusions are consistent with this court's decisions regarding prosecutorial immunity. In *Imbler*, *supra*, the court suggested that all acts associated with the "obtaining, reviewing, and evaluating of evidence" in preparation for "the initiation of criminal process and for a trial" are quasi-judicial. *Id.* at 431, note 33. In *Imbler*, the court

rejected the contention that the prosecutor's conduct was "investigatory" when he requested that the police hold off questioning a witness about a pending charge until after the witness had completed his testimony. *Id.* at 430, note 32. The court construed such conduct as "an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Ibid.* Similarly, the conduct by the prosecutor in selecting his experts on boot-print evidence relates to a task fairly within his function as an advocate.

The petitioner argues that the prosecution's conduct in allegedly procuring false/unreliable evidence to be used at trial should be deemed investigatory conduct not entitled to absolute immunity. This court rejected such an analysis in *Butz, supra*, when it stated:

> Evidence which is false or unpersuasive should be rejected upon analysis by an impartial trier of fact. If agency attorneys were held personally liable in damages as guarantors of the quality of their evidence, they might hesitate to bring forward some witnesses or documents. "This is particularly so because it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present."

Id. at 517 (citations omitted). See also, *Cook v. Houston Post*, 616 F.2d 791 (5th Cir. 1980) (conduct of state prosecutor in interviewing witnesses before presenting their testimony to the grand jury protected by absolute immunity).

The argument in favor of absolute immunity for the prosecutorial conduct at issue in this case is to protect the diligent and faithful prosecutor from being subjected to unnecessary retaliatory and harassing

lawsuits. It is not for the benefit of the woeful prosecutor who strays from the strict ethical guidelines which implore prosecutors to act as ministers of justice and pursue the truth. With respect to judicial immunity this court has commented that:

> "[t]his immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences'."

Imbler v. Pachtman, supra, 424 U.S. at 418, note 12. (Citation omitted.)

CONCLUSION

In light of the foregoing, *amicus curiae* respectfully submits that the conduct of the prosecutor concerning the issues pending before this court are entitled to absolute immunity. Where an accused complains of alleged constitutional violations attributable to prosecutorial conduct which affected the fairness of judicial proceedings, the prosecutor is entitled to absolute immunity since judicial safeguards are available as a means of controlling the alleged constitutional violations. Accordingly, we urge the court to rule in favor of respondent and uphold the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted on behalf of the
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